Supreme Court, U.S.
FILED

98 16 JUN 23 1998

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

SHELBY BAUCUM,
Petitioner,

v.

ROBYN SANDERS,
CYNTHIA MULLANIX AND
CASA VIEW BAPTIST CHURCH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment to the United States Constitution bars claims for clergy counseling malpractice and breach of fiduciary duty where such counseling involves an inseparable mixture of spiritual and secular counseling.

PARTIES TO THE PROCEEDING

Only the parties named in the caption are parties to this proceeding before the Fifth Circuit Court of Appeals.

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TO THE UNITED STATES COURT OF
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Shelby Baucum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 134 F.3d 331. The opinion of the district court (App., *infra*, 14a) is reported at 929 F.Supp. 1028.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on February 11, 1998 (App., *infra*, 1a) and denied a timely petition for rehearing on March 26, 1998. App., *infra*, 42a.

The jurisdiction of this Court is invoked under 28 U.S.C. §

1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." (hereinafter "the First Amendment", "the Constitution", or "the Free Exercise Clause").

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et. seq.

Robyn Sanders and Cynthia Mullanix ("Respondents" herein) were members and employees of Casa View Baptist Church. Shelby Baucum ("Petitioner" herein) was an ordained Baptist minister whose position at Casa View Baptist Church was Minister of Administration and Education. He was not a licensed counselor. App., *infra*, 52a-53a. His limited knowledge of counseling was obtained through his education and training as a minister. App., *infra*, 52a.

At trial, Respondents testified that they were engaged in a counseling relationship with Petitioner, and also engaged in sex with Petitioner during this counseling relationship. Respondents reported these matters to Casa View Baptist Church and were fired. Petitioner was asked to resign and did resign.

Respondents sued Casa View Baptist Church and Petitioner. The church filed a motion for summary judgment, and the summary judgment was granted. As to Petitioner, Respondents alleged in their trial pleading that the essence of their respective counseling relationships was based upon their pastoral relationships with Petitioner. App., *infra*, 54a-57a. Respondents proceeded to trial against Petitioner, and a jury verdict was rendered against Petitioner.

App., *infra,* 14a. At trial, Respondent Sanders testified that Petitioner gave her spiritual guidance as to her marital situation as a whole. App., *infra,* 45a-46a. She could not separate what was spiritual and secular counseling. *Id.* Petitioner gave her counseling directed specifically at spiritual matters. App., *infra,* 45a.

Respondent Mullanix testified that Petitioner discussed and interpreted scripture during their counseling sessions. App., *infra,* 46a-50a. She testified that Petitioner was a spiritual counselor to her. App., *infra,* 46a. Petitioner gave Respondent Mullanix spiritual advice that any Baptist minister would give. App., *infra,* 48a-49a. Respondent Mullanix further testified that she defined spiritual counseling as including discussion and interpretation of Scriptures and the Bible. App., *infra,* 46a. She testified that she did that in the counseling sessions with Petitioner. App., *infra,* 49a-50a.

Peter Rutter, M.D., a psychiatrist who was Respondents' expert witness, testified that the relationship Petitioner had with Respondents was a pastoral counseling relationship. App., *infra,* 50a-51a. Dr. Rutter testified that Respondents discussed Scripture in the counseling relationship and that Petitioner gave Respondents advice based upon his interpretation of the Scriptures. App., *infra,* 51a. Dr. Rutter testified that the counseling grew out of Petitioner's role as a minister of the church. App., *infra,* 51a. Respondents looked to Petitioner for religious guidance. *Id.* Dr. Rutter further testified that spiritual and religious guidance and interpretation of Biblical Scriptures was an element of the counseling relationship between Respondents and Petitioner. *Id.*

The Fifth Circuit states in its opinion that it was Petitioner who testified that he sometimes discussed scripture in the counseling session. App., *infra,* 3a. To the contrary, Petitioner did not testify about what was discussed in the counseling sessions, because he denied counseling relationships existed with Respondents. The district court and the Fifth Circuit opinions ignore the very clear testimony of Respondents and their expert, Dr. Rutter, that they did have pastoral counseling relationships with Petitioner which arose out of their

relationships with Petitioner as their minister.

The district court submitted the issues of "essentially secular" marital and mental health counseling malpractice and breach of fiduciary duty to the jury. App., *infra*, 58a-62a. The jury returned a verdict in favor of Respondents. The issue was submitted to the jury as "essentially secular marital and mental health counseling" over Petitioner's objections that "essentially" required the jury to consider the religious doctrines, training and beliefs of Petitioner and attempt to separate the spiritual from the secular.

In its opinion, the district court relied on a line of cases beginning with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and including *Thomas V. Review Bd. of Ind. Security Div.*, 450 U.S. 707 (1981), and *Employment Div. Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1995), in holding that neutral laws of general applicability can regulate such conduct as occurred in this case without violating the First Amendment. The district court also relied on some non-Texas state court decisions that held a minister to the same secular standard to which secular professionals are held under similar circumstances. Further, the district court held that there was no evidence produced at trial that Petitioner quoted Bible passages or made reference to religious materials during these sessions, or that Petitioner did not quote Scripture or broach religious topics. App., *infra*, 24a. To the contrary, the Respondents' testimony and that of their expert established an inseparable mixture of pastoral spiritual and secular counseling as referenced previously herein. App., *infra*, 43a-53a.

The Fifth Circuit basically opines that secular beliefs and behavior can be separated out from an otherwise religious relationship between a minister and a parishioner. App., *infra*, 6a. The Fifth Circuit held that when the district court instructed the jury to consider whether Petitioner's conduct was "essentially secular" in nature, Petitioner was provided with adequate protection under the Free Exercise Clause. *Id.*

REASONS FOR GRANTING THE PETITION

The Fifth Circuit acknowledged that whether the First Amendment would protect a minister asserting that his alleged civil misconduct was rooted in religious belief raises a "difficult First Amendment issue." App., *infra*, 9a. At the federal and state court levels, decisions effectively eroding the protection afforded to ministers and pastoral counselors by the First Amendment are proliferating rapidly, and the need for guidance from this Court is acute. This case represents a timely and rare opportunity to provide that much needed guidance. Moreover, the decision below is erroneous, and the issue that it addresses is important.

A. The Court of Appeals' recognition of a cause of action for breach of a fiduciary duty in a pastoral counseling relationship conflicts with the Seventh Circuit.

In *Dausch v. Ryske*, 52 F.3d 1425 (7th Cir.1994), the Seventh Circuit faced similar issues as the Fifth Circuit did in this case. The Seventh Circuit held that if it were to recognize a cause of action for breach of fiduciary duty arising out of a pastoral counseling relationship, it would be required to define a reasonable duty standard and to evaluate the subject minister's conduct against that standard, "an inquiry . . . that is of doubtful validity under the Free Exercise Clause." 52 F.3d at 1438. The Fifth Circuit expressly indicated that its holding is consistent with the Seventh Circuit's holding in *Dausch* (App., *infra*, 6a); however, an examination of the record establishes the conflict with *Dausch*.

Respondents and their expert testified that the respective counseling relationships involved an inextricably intertwined mixture of pastoral/spiritual and secular counsel. App., *infra*, 43a-53a. The Fifth Circuit upheld the district court judgment regarding the cause of action for breach of fiduciary duty on the erroneous conclusion that the district court properly insulated the jury from considering the scope of a fiduciary duty owed parishioners by their clergy. App., *infra*, 6a. The fallacy of the Fifth Circuit's holding in that regard lies

in the district court's erroneous jury instructions concerning the underlying counseling relationships, respectively.

The district court attempted to avoid a First Amendment conflict by instructing the jury that it must determine whether the respective counseling relationships were "essentially secular marital or mental health counseling in nature." App., *infra*, 58a-62a. This inquiry violated Petitioner's First Amendment rights because the same imposes a secular standard of care upon counseling relationships that included an undetermined mixture of pastoral/spiritual and secular counsel. By attempting to define that standard, the district court impermissibly required the jury to identify the beliefs and practices of a Baptist minister engaged in counseling and to what extent Petitioner acted or failed to act in accordance with those beliefs and practices. The Fifth Circuit recognized that such determination would violate the First Amendment; however, it found that the district court's jury instructions and questions on the fiduciary relationship issue did not involve the prohibited examination of "religious doctrine." App., *infra*, 8a.

Petitioner is not aware of any Texas cases which have established or recognized a fiduciary duty between persons and their clergy in circumstances involving a pastoral counseling relationship. In this respect, the Fifth Circuit erred when it expanded Texas law beyond established boundaries by creating a cause of action for breach of a fiduciary duty arising out of an inextricably intertwined pastoral/spiritual and secular counseling relationship. See *Dausch*, 52 F.3d at 1438. The Court should grant certiorari to review this important conflict between the Fifth Circuit and Seventh Circuit.

B. The Court of Appeals' decision impermissibly allows the courts to examine religious doctrine and procedure in violation of the First Amendment.

The Respondents proceeded to trial on their Second Amended Complaint which clearly establishes that the claims are in essence claims for clergy malpractice. App., *infra*, 54a-57a. Courts have

uniformly refused to recognize causes of action for clergy malpractice for reason that the same would require examination of religious tenets and doctrine. See *Dausch*, 52 F.3d at 1432 (n. 4). Judge Coffey, in his concurring opinion in *Dausch*, indicates forcefully that his concurrence in the decision, "is in no way to be interpreted as expanding the liability of the clergy and thus spiritual counseling, or some combination of spiritual and secular counseling, remains shielded by the First Amendment." *Id.* at 1429. In the same opinion, Judge Ripple indicates that if a church undertakes to offer "purely secular counseling" to its members, the providers of those services would be subject to applicable secular standards (i.e., professional negligence/malpractice claims). *Id.* at 1433. Purely secular counseling relationships were not at issue below.

The undisputed evidence established that the respective counseling relationships between Petitioner and Respondents represented an inseparable mix of pastoral/spiritual and secular counseling. App., *infra*, 43a-53a. Notwithstanding such, the district court required the jury to determine the "essential" nature of those relationships. App., *infra*, 58a-62a. Such inquiry ran afoul of the First Amendment because it required "the examination of religious doctrine." *Dausch*, 52 F.3d at 1433. In effect, the jurors were required to determine whether the marital counseling provided by Petitioner (i.e., stay in the marriage, become financially independent, listening, advising, etc.) was pastoral/spiritual or secular in nature. In doing so, the jury had to consider Petitioner's beliefs, practices and training as an ordained Baptist minister and compare and weigh the same with secular counseling practices and training.

This constitutionally impermissible inquiry invalidates both the counseling malpractice and breach of fiduciary duty claims of Respondents since both such causes of action were based upon a finding that counseling relationships were "essentially secular" in nature. App., *infra*, 58a-62a. The submission of the respective claims of Respondents in the form of counseling malpractice and breach of fiduciary duty causes of action upon a finding of "essentially secular" counseling relationships is "simply and elliptical way of alleging clergy

malpractice." *Dausch*, 52 F.3d at 1438. It is precisely this inquiry that the Colorado Supreme Court condemned in *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988) (en banc) (dismissing "negligent marital counseling" count in action against priest). The Fifth Circuit's affirmance does not withstand constitutional muster and should not be allowed to stand.

C. The question presented is important.

While the federal and state courts uniformly reject "clergy malpractice" claims on First Amendment grounds, there has been a proliferation of "minister" cases filed under the guise of claims for professional (secular) malpractice, breach of fiduciary duty, intentional infliction of emotional distress, alienation of affection, etc. This trend is likely to continue unless clear guidelines are established by the Court.

On February 12, 1998 , the Wall Street Journal stated in an article about this case that the Fifth Circuit's decision is, ". . .likely to make clergy increasingly reluctant to talk to parishioners about their problems." Lisa Miller, *Federal Appeals Court Upholds Ruling Against Pastor Sued for Malpractice*, Wall St. J., Feb.12, 1998, at B11. The article continues, saying that this decision against Mr. Baucum is the first of its kind by a federal appeals court. *Id.* Reginald B. Burgess, Deputy Executive Director of the American Association of Pastoral Counselors is quoted in the article as saying that "pastors are already scared to death of litigation." *Id.*

The Fifth Circuit decision exposes even those clergy that keep conversations between parishioners and themselves on a strictly spiritual basis to potential liability since juries will be allowed to determine whether counseling advice which may be in accordance with church doctrine is also secular in nature. Even casual, Biblically-based advice on marriage or numerous other topics could result in liability for the clergy if they are held to the standard of secular mental health counselors. This decision obviously has significant implications for the Free Exercise Clause and for all ministers and the churches

where they minister. Such approach puts the judiciary on a very rough ride down the slippery slope to unconstitutional results. See *Schmidt v. Bishop*, 779 F.Supp. 321, 328 (S.D.N.Y. 1991).

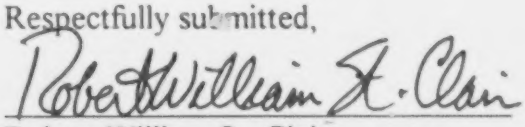
The decision below is erroneous, and the issue that is addressed in the case is of great importance to both churches and ministers who speak on behalf of and work for churches across the United States.

CONCLUSION

This case presents a question of exceptional importance -- whether ministers engaged in pastoral counseling relationships with parishioners involving an inseparable combination of spiritual and secular counseling should be held to secular standards. The serious implications of this important issue extend to thousands of churches where ministers provide informal pastoral counseling on a daily basis. Unless corrected by this Court, the Fifth Circuit's decision will have a chilling effect on parishioners across the United States who will not have the benefit of their minister's counsel.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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U.S. COURT OF APPEALS
FILED
FEB 11 1998
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10870

ROBYN SANDERS; CYNTHIA MULLANIX,
Plaintiffs-Appellants-Appellees,
v.
CASA VIEW BAPTIST CHURCH, ET AL.,
Defendants,
CASA VIEW BAPTIST CHURCH,
Defendant-Appellee,
SHELBY BAUCUM,
Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

February 11, 1998

Before POLITZ, Chief Judge, BENAVIDES, and PARKER, Circuit Judges.

BENAVIDAS, Circuit Judge:

The plaintiffs, Robyn Sanders and Lisa Mullanix, brought suit against their employer, Casa View Baptist Church (CVBC), and one of its ministers, Shelby Baucum, for alleged violations of Title VII and Texas law arising out of Baucum's conduct as their marriage counselor and supervisor at CVBC. The district court granted summary judgment in favor of CVBC. The claims against Baucum–that he committed malpractice and breached his fiduciary duties as a marriage counselor by, among other things, encouraging and

consummating a sexual relationship with each plaintiff–proceeded to trial. The jury found for the plaintiffs and awarded punitive damages on each claim.

On appeal, Baucum asserts that the plaintiffs' claims and the district court's jury instructions were barred by the First Amendment, and that the plaintiffs' punitive damages awards were excessive. Also before us are the plaintiffs' contentions that CVBC was not entitled to summary judgment and that the district court abused it's discretion by excluding an untimely affidavit from the summary judgment record. We affirm.

I.

We review a grant of summary judgment *de novo* "under the same standards as that applied by the district court. Summary judgment is required when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ellert v. University of Texas*, 52F.3d 543, 545 (5th Cir. 1995). Consequently, we set forth the pertinent facts in the light the most favorable to the plaintiffs.[1]

In 1988, CVBC hired Baucum to be its Minister of Education and Administration (MEA). As MEA, Baucum's duties did not include counseling, and he knew that he was not a member of the CBVC staff responsible for providing spiritual counseling to CVBC members. He also knew that CVBC had a written policy of referring church members in need of non-pastoral counseling to a licensed professional counselor.

In December 1990, Muilanix, a member of CVBC, began seeing Baucum for marital counseling. In February 1991, CVBC hired Sanders as an administrative secretary, with Baucum as her immediate supervisor. Shortly thereafter, Sanders, like Mullanix, began seeing Baucum for marital counseling.

Mullanix and Sanders each began this counseling at Baucum's

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1 We apply a similar standard of review when considering a district court's denial of a motion for judgment as a matter of law. *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 273 (5th Cir. 1997). Because Baucum does not challenge the sufficiency of the plaintiffs' evidence, we describe the facts regarding his behavior as a counselor as they were found by the jury.

invitation after he represented that he was qualified by education and experience to provide marriage counseling. They believed that Baucum was authorized by CVBC to provide marital counseling, in part because he told each of them that he had counseled other women at CVBC. The jury found that Baucum entered into fiduciary relationships with the plaintiffs because he acquired influence and gained their trust and confidence during the course of these separate counseling relationships.

Although Baucum testified that he sometimes discussed scripture in his counseling sessions with Mullanix and Sanders, the jury found that the counseling he provided was "essentially secular" in nature. At trial, the plaintiffs presented evidence that Baucum breached his duties as a marriage counselor, not only by expressing love and affection for each of them and encouraging them both to express these feelings for him, but also by engaging in sexual intercourse with each of them on a number of occasions. They also presented evidence that Baucum breached his fiduciary duties, not only by having sexual intercourse with them, but also by disclosing their confidences, including intimate details of their marriages and sexual histories.

In March 1991, CVBC hired Mullanix as a receptionist, and like Sanders, she was supervised by Baucum. The plaintiffs' sexual relationships with Baucum continued while he was their supervisor, and each plaintiff claims that on at least one occasion, she slept with him because of her belief that his behavior implied that she would be discharged if she did not. Further, after his counseling relationship with each plaintiff ended in September 1991, Baucum began both to criticize their work performance and discouraged their hopes of promotions. He also engaged in behavior and conversation of a sexual nature that was unwelcome at that time.

On September 22, 1991, the plaintiffs informed one another of their relationships and problems with Baucum. Together they disclosed the existence of these relationships and Baucum's behavior to a member of CVBC's Personnel Committee (PC) on September 23, 1991. On November 22, 1991, CVBC fired Mullanix and Sanders because they committed adultery in violation of church policies.

II.

After discovery, the district court granted CVBC's motion for summary judgment on the plaintiffs' Title VII and state law claims, thereby disposing of the entire case against CVBC. With respect to their discriminatory discharge, hostile work environment, and quid pro quo claims, the district court held that the plaintiffs did not produce evidence indicating that CVBC's justification for their dismissals was pretextual or that CVBC knew or should have known of Baucum's alleged sexual harassment. Concerning their claims under Texas law, the district court held that there was no basis in the record for holding CVBC legally responsible for Baucum's misconduct under the doctrine of respondent superior or for concluding that CVBC knew or should have known that Baucum presented a risk of harm to the plaintiffs. The district court then refused to allow the plaintiffs to supplement the summary judgment record with an untimely affidavit.

The district court granted partial summary judgment in favor of Baucum, but allowed the plaintiffs' claim that he committed malpractice as a marriage counselor and breached his fiduciary duties to go to trial. At the close of the evidence, the district court denied Baucum's motion for judgment as a matter of law and overruled his objection to the jury instructions. The jury found for the plaintiffs on each count and awarded them each $42,500 in punitive damages for Baucum's malpractice and $42,500 in punitive damages for his breach of fiduciary duties. After the verdict, Baucum renewed his motion for judgment as a matter of law, again arguing that these claims were barred by the Free Exercise Clause of the First Amendment. This motion was denied, as was his claim that the punitive damages were excessive because they twice punished him for the same conduct.

III.

A.

On appeal, Baucum argues that because the First Amendment precludes judicial review of certain ecclesiastical disputes, his secular misconduct as the plaintiffs' counselor was not actionable because it occurred within two inherently ecclesiastical, rather than "purely

secular," counseling relationships.[2] Specifically he contends: 1) that he was entitled to judgment as a matter of law on the plaintiffs' claims that he committed malpractice as a marriage counselor and breached his fiduciary duties because his trial testimony– that he occasionally discussed scripture in his counseling sessions with the plaintiffs–demonstrated that the counseling he provided was not purely secular; 2) that in the alternative, the case should be remanded because he was entitled to a jury instruction that required the jury to find that the counseling that he provided was purely secular in nature and thus a matter of judicial rather than ecclesiastical concern; or 3) that he was otherwise entitled to judgment as a matter of law because the evidence demonstrated that the plaintiffs' claims were in essence noncognizable claims for "clergy malpractice."[3] We disagree.

The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships. Although Baucum's contention that the Free Exercise Clause prohibits the judiciary from reviewing the conduct of those involved in relationships that are not purely secular in nature might, if adopted, foster the development of some important spiritual relationships by eliminating the possibility of civil or criminal liability for participating members of the clergy, the constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in our society. *Cf. County of Allegheny v. ACLU*, 492 U.S. 573,593-594 (1989) (interpreting the

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[2] Baucum also argues that the plaintiffs were twice awarded punitive damages for his sexual misconduct and that their punitive damages awards should accordingly be reduced by half. We reject this argument because it ignores the differences between the malpractice and fiduciary duty claims before the jury and because it mischaracterizes Baucum's misconduct as solely sexual in nature. The jury, therefor, did not necessarily twice award punitive damages for the same misconduct.

3 Baucum does not challenge the availability of these causes of action, nor the propriety of the jury instructions, under Texas law.

First Amendment to preclude the state from favoring religion over non-religion). The district court, therefore, did not err by denying Baucum's motion for judgment as a matter of law nor by rejecting his proposed jury instructions, which would have required the jury to find that his counseling relationships with the plaintiffs were purely secular in order for it to find that his secular misconduct within these relationships was actionable. In fact, by instructing the jury to consider whether Baucum's counseling, rather than his alleged misconduct, was "essentially secular" in nature, the district court provided Baucum with more than adequate protection under the Free Exercise Clause.

Contrary to Baucum's suggestion, this conclusion is entirely consistent with the Seventh Circuit's decision in *Dausch*, 52 F.3d 1425 (7th Cir. 1994). Like the plaintiffs in this case, the plaintiff in Dausch alleged that her minister "held himself out" to "be a duly qualified person engaged in providing psychological counseling" and committed "professional negligence" by engaging in "sexual relations" with her during counseling sessions. *Id.* at 1427-28. Foreshadowing Baucum's argument on appeal, the district court in *Dausch* dismissed this malpractice claim because it found that the plaintiff "'failed to adequately allege that Ryske's counseling was purely secular.'" *Id.* at 1431 (Ripple, J., concurring) (quoting the district's court order)(emphasis added). The Seventh Circuit, in a per curiam opinion, reversed and reinstated the plaintiffs malpractice claim. This disposition, therefore, supports our view that the First Amendment's respect for religious relationships does not require a minister's counseling relationship with a parishioner to be purely secular in order for a court to review the propriety of the conduct occurring within that relationship.[4]

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4 In fact, one member of the panel in *Dausch* expressly reached this conclusion. Judge Ripple, in his concurring opinion, noted that a plaintiff claiming "that the provider held himself out to be providing the services of a psychological counselor" would survive a motion to dismiss predicated upon the Free Exercise Clause. *Dausch*, 52 F.3d at 1433. Although Judge Coffey also wrote separately to express his view that "some combination of spiritual and secular counseling remains shielded by the First Amendment," *id.* at 1429 (Coffey, J., concurring), this position cannot be interpreted to mean that a minister's counseling activities must be purely secular in order for any of his or her conduct to be

Instead, the Free Exercise Clause protects religious relationships, including the counseling relationship between a minister and his or her parishioner, primarily by preventing the judicial resolution of ecclesiastical disputes turning on matters of "religious doctrine or practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-50 (1969); see also *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of scriptural interpretation."). The sanctity of these relationships is further protected by other religious freedoms, including the limited right to engage in conduct that is rooted in religious belief. *Employment Div. v. Smith*, 494 U.S. 872, 877-78, 881 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Under the evidence produced at trial, however, neither of these constitutional protections prevents Baucum from being held liable for his misconduct as a marriage counselor and a fiduciary who occasionally discussed scripture within the context of two otherwise secular counseling relationships with members of his congregation.

Because the judiciary must abstain from ecclesiastical disputes involving questions of doctrine or practice, state courts have "rejected uniformly" claims for "clergy malpractice." *Dausch*, 52 F .3d at 1432 (Ripple, J., concurring) (citing, for example, *Destefano v. Gabrian*, 763 P.2d. 275 (Colo. 1988) (en banc)); see, *e.g.*, *F.G. MacDonnell*, 696 A 2d 697, 703 (N.J. 1997). This is because

> such a claim requires definition of the relevant standard of care. Defining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.

MacDonnell, 696 A .2d at 703. Thus, as these courts have correctly concluded, to recognize a claim for clergy malpractice would require

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actionable, for this view would conflict with the panel's decision to reverse the district court.

courts to identify and apply the teachings of a particular faith, thereby making the judiciary responsible for determining what conduct and beliefs are part of a particular region.

The First Amendment difficulties posed by a claim for clergy malpractice are not, however, present in this case because the duties underlying the plaintiffs' claims for malpractice by a marriage counselor and breach of fiduciary duties are not derived from religious doctrine. That is, because the jury found that Baucum held himself out as possessing the education and experience of a professional marriage counselor, his counseling activities with the plaintiffs were judged, not by standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances. See *Dausch*, 52 F .3d at 1429, 1431, 1433 (allowing a parishioner to claim that her minister had a "'duty to possess and apply the skill and knowledge of a reasonably well qualified person providing psychological counseling'" because the minister "held himself out to be providing the services of a psychological counselor").[5] Similarly, because the jury found that he entered into a fiduciary relationship with the plaintiffs, Baucum's conduct was to be consistent with "something stricter than the morals of the market place." *Meinhard v. Salmon*, 164 N.E. 545,546 (N.Y. 1928). But that "something" was "the finer loyalties exacted by courts of equity," *Johnson v. Peckham*, 120 S.W. 2d 786, 788 (Tex. 1938), rather than the teachings of his faith.[6] Thus, Baucum was not

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5 The district court instructed the jury that Baucum could not be held liable for malpractice unless "he made representations that he possessed the skill, knowledge or competence of a secular marital or mental health counselor."

6 Our holding is consistent with *Dausch*, which affirmed both state law and First Amendment grounds the dismissal of a parishioner's breach of fiduciary duty claim against her minister. 52 F .3d at 1438 (Ripple, J., concurring). Judge Ripple explained that *Dausch's* fiduciary duty claim was dismissed, in part, because she alleged, in "contrast to the other counts of [her] complaint," that "the breach of fiduciary duty occurred in the context of a pastor-parishioner relationship." *Id.* That is , *Dausch* asserted that her pastor was her fiduciary, not because of his conduct as her counselor , but simply because of her status " as a member of the congregation... seeking counseling" and his status as her " pastor and counselor." *Id.* In contrast, the jury in this case was instructed that the primary

entitled to judgment as a matter of law on the grounds that these claims were barred by the constitutional principle that the judiciary must abstain from ecclesiastical disputes concerning questions of religious doctrine and practice.

Consequently, to invoke the protection of the First Amendment for conduct taking place within his counseling relationships with the plaintiffs, Baucum must assert that the specific conduct allegedly constituting a breach of his professional and fiduciary duties was rooted in religious belief. See *Smith*, 494 U.S. at 881; *Yoder*, 406 U.S. at 215; see also *Destefano*, 763 P .2d at 283-84 (" In the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused the plaintiff's distress was in fact part of the belief and practices of the religious group."); *MacDonnell*, 696 A .2d at 558 (holding that in order to be protected, the "conduct at issue must have been part of the beliefs and practices of the defendant's religion"). Baucum's First Amendment arguments before the district court, however, reflected the obvious truth that the activities complained of by the plaintiffs were not part of his religious beliefs and practices and he is not so brazen as to now contend otherwise. We therefore hold that he was not entitled to judgment as a matter of law on the ground that the plaintiffs' claims were barred by the First Amendment.[7]

B.

Turning now to the plaintiffs' claims against CVBC, they contend on appeal that they have met their burdens of production on summary judgment under Title VII because they adduced evidence showing that their discharges were discriminatory, that they were victims of quid pro quo sexual harassment for which they claim CVBC is automatically liable, and that they were each subjected to hostile

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relationship between a minister and a parishioner is not a fiduciary one, and that Baucum could not be held liable for breaching his fiduciary duties unless he "acquired and abused" influence and "betrayed" confidences learned in a "relationship of trust."

7 Like the Colorado and New Jersey Supreme Courts, we do not decide whether the First Amendment *would* protect a minister asserting that his civil misconduct was rooted in religious belief. See, *e.g.*, *Destefano*, 763 P .2d at 284 (noting that this raises a "difficult First Amendment issue"); *MacDonnell*, 696 A .2d at 560-61.

work environment of which CVBC should have been aware. The plaintiffs further assert that their evidence creates a genuine issue of material fact regarding CVBC's liability for Baucum's breach of his professional duties under general agency principles and the theory of ratification. They also argue that they have produced evidence justifying a finding that CVBC knew or should have known of the risks posed by Baucum's counseling and harassing activities. Finally, they claim that the district court abused it's discretion by refusing to supplement the summary judgment record with an untimely affidavit. Having carefully reviewed the record in this case, we address and reject each of these contentions in turn.

The plaintiffs argue that their evidence creates a fact issue regarding whether their discharges were discriminatory. They did not, however, produce any evidence suggesting that they were fired because of their gender. In fact, the record shows that Baucum, who also committed adultery,[8] was forced to resign, and that CVBC's position against adultery was neutral with respect to sex, longstanding, and understood by both plaintiffs at the time they engaged in sexual conduct with Baucum.

To survive summary judgment on their hostile work environment claims, the plaintiffs needed to produce evidence showing, among other things, "that [CVBC] knew or should have known of the harassment in question and failed to take prompt remedial action." *Jones v. Flagship Int'l*, 793 F .2d 714, 719-20 (5th Cir. 1986) (quoting *Henson v. City of Dundee*, 682 F .2d 897, 903-05 (11th Cir. 1982)). Because there is no dispute that CBVC took prompt remedial action upon learning of Baucum's misconduct on September 23, 1991, the plaintiffs were required to produce evidence that CBVC should have known of Baucum's behavior as a supervisor before it was disclosed in order to survive summary judgment on this claim.

The record, however, does not reveal a basis for finding that CVBC should have known that Baucum created a hostile work environment for Sanders and Mullanix. This is because the evidence

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8 Baucum was married when he engaged in sexual intercourse with the plaintiffs.

relied on by the plaintiffs indicates, at most, that CVBC knew that Baucum had offended a few women by complimenting them on their appearances and hugging them. Evidence of this conduct, however, does not preclude summary judgment. See *e.g., Pfau v. Reed*, 125 F .3d 927, 939 n. 10 (5th Cir. 1997) ("[I]n the cases that have held employers liable on the basis that the pervasiveness of sexual harassment implies constructive knowledge, the pervasive conduct *is the conduct of which the plaintiff complains*.").

To withstand summary judgment on their quid pro quo claims, the plaintiffs were required to produce evidence showing, among other things, that "the harassment complained of affected tangible aspects of their "compensation, terms, conditions, or privileges of employment." *Jones*, 793 F .2d at 277. In addition, they were required to develop evidence demonstrating that their "acceptance or rejection of the harassment" was "an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment." *Id.* The plaintiffs' own testimony–that they were subjected to mild criticism of their work and told they would not be promoted to positions they knew did not exist–indicates that their jobs were not tangibly and detrimentally affected by their decisions to end their sexual relationships with Baucum. See *Farley v. American Cast Iron Pipe Co.*, 115 F .3d 1548, 1552-53 (11th Cir. 1997); *cf. Mattern v. Eastman Kodak Co.*, 104 F .3d 702, 708 (5th Cir.) (noting, in the context of a retaliation claim, that "the verbal threat of being fired" and a "reprimand" are not "adverse employment actions" because they " lack...consequence"), *cert. denied*, 118 S. Ct. 336 (1997); *Bryson v. Chicago St. Univ.*, 96F .3d 912, 916 (7th Cir. 1996) (noting that a tangible job detriment is a substantially adverse employment action, such as being transferred, relieved of responsibilities, denied the use of an office and telephone, or stripped of an official title). Further, there is no objective evidence in the record supporting the plaintiffs' claims that they engaged in sex with Baucum under an implied threat of discharge if they did not. See *Nichols v. Loral Vought Sys. Corp.*, 81 F .3d 38, 42 (5th Cir. 1996) (Noting that "subjective speculation" will not establish a fact question in a discrimination case).

In order for the plaintiffs to have proceeded to trial on their claim that CVBC is liable under the doctrine of respondent superior

for Baucum's tortious conduct as one of the church's employees, they needed to produce evidence that Baucum's misconduct "f[e]ll within the scope of [his] general *authority*... and [was] in furtherance of [CVBC's] business and for the accomplishment of the object for which [Baucum] was hired." Dieter v. Bakers Serv. Tools, 739 S.W. .2d 405, 407 (Tex. Ct. App. 1987) (emphasis added). The plaintiffs' evidence, however, failed to create a genuine issue of material fact regarding Baucum's actual or apparent authority to engage in counseling. In fact, the record indicates that Baucum did not have this authority because his job description and responsibilities as MEA indicate that he was not hired to provide counseling, that he knew that counseling was not part of his job description, that the MEA was not responsible for providing spiritual counseling, and that CVBC had a policy of referring non-pastoral counseling to a licensed professional counselor.[9]

The plaintiffs also contend that CVBC was liable for Baucum's misconduct as a counselor under the doctrine of ratification. *Prunty v. Arkansas Freightways, Inc.*, 16 F .3d 649, 652-53 (5th Cir. 1994). This doctrine imposes liability on an employer when that employer adopts, confirms, or fails to repudiate the unlawful acts of an employee of which the employer is aware. *Id.* There is, however, no evidence in the record indicating that CVBC was actually aware of Baucum's counseling activities.[10]

Aside from principles of agency, the plaintiffs also sought to hold CVBC liable on the theory that an employer that negligently "retains in his employ an individual who is incompetent or unfit for the

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9 The plaintiffs also argue that CVBC is liable for Baucum's misconduct as a counselor under Section 219 of the Restatement (Second) of Agency, which provides for employer liability when the power it entrusts to an employee aid that employee in breaching professional and fiduciary duties. As noted above, there is no basis in the record for finding that CVBC entrusted Baucum with marital counseling powers. Further, this provision of the Restatement has not been adopted in Texas and thus will not be recognized by this Court. See, *e.g.*, *Folks v. Kirby Forest Indus.*, 10 F .3d 1173, 1182 (5th Cir. 1994).

10 Further, even if a principle can ratify the acts of an agent of which it should have been aware, there is no basis for finding that CVBC had constructive notice of Baucum's counseling activities. *See infra.*

job may be liable to a third party whose injury was proximately caused by the employer's negligence." *Akins v. Estes*, 888 S.W. .2d 35, 42 (Tex. Ct. App. 1994), *affirmed in part and reversed in part sub nom. Golden Spread Council, Inc. v. Akins*, 926 S.W. .2d 287 (Tex. 1996) (reversing on grounds unrelated to the existence of this theory of negligence). To withstand CVBC's motion for summary judgment on this negligence claim, the plaintiffs needed to show that CVBC knew or should have known that Baucum's conduct as a supervisor or counselor presented an unreasonable risk of harm to others. As noted in conjunction with the plaintiffs' hostile work environment claims, however, the record does not indicate that CVBC should have known of Baucum's sexual harassment of Sanders and Mullanix. Further, even if the plaintiffs' evidence suggested that CVBC should have known that Baucum was counseling the plaintiffs, there is simply no evidence that CVBC should have known that Baucum was likely to engage in sexual misconduct or disclose confidences as a marriage counselor.

The plaintiffs' final claim on appeal is that the district court abused its discretion by denying their motion to supplement the summary judgment record after summary judgment had been granted in favor of CVBC. This argument is without merit because the evidence was cumulative and did not support the plaintiffs' theory of constructive notice. Therefore, the district did not abuse its discretion in denying this untimely motion. *See, e.g., Bernhardt v. Richardson-Merrell, Inc.*, 892 F .2d 440(5th Cir. 1990).

IV.

For the foregoing reasons, we AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBYN SANDERS &	§	
CYNTHIA MULLANIX,	§	
	§	
Plaintiffs,	§	
	§	
CIVIL ACTION NO.	§	
v.	§	
3:92-CV-1630-P	§	
	§	
SHELBY BAUCUM,	§	
	§	
Defendant.	§	

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 10 1996
NANCY DOHERTY, CLERK
BY _____ DEPUTY

ENTERED ON DOCKET
6-10-96 PURSUANT
TO F.R.C.P. RULES

MEMORANDUM OPINION and ORDER

Plaintiffs Robyn Sanders and Cynthia Mullanix, who were members and employees of Casa View Baptist Church ("the Church"), entered into secular counseling relationships with their minister, Shelby Baucum, who assured them that he was an experienced counselor equipped to assist them with their marital and emotional problems. During the course of the counseling sessions, the relationship between Baucum and each of the Plaintiffs became sexual in nature. Soon after learning of the situation, the Church asked Baucum to resign and terminated Plaintiffs from their respective positions. As a result of these events, Plaintiffs initiated a lawsuit against Baucum and the Church; their causes of action against Baucum included counseling malpractice, breach of fiduciary duty and intentional infliction of emotional distress, while they alleged that the Church was liable for discrimination in employment pursuant to Title VII, negligent hiring, negligent supervision and intentional infliction of emotional distress. Baucum also brought cross-claims against the Church for breach of contract and wrongful discharge.

Subsequently, over the course of nearly four years, this case

wound its way through extensive discovery and various pre-trial motions. In August 1995, the Court issued an opinion awarding summary judgment in favor of the Church on all of Plaintiffs' claims, dismissing Baucum's cross-claims against the Church as barred by the First Amendment, but allowing Plaintiffs' claims against Baucum to proceed to trial. Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N.D. Texas 1995).

The case eventually culminated with a jury trial in January 1996; after nine-days of testimony and nearly ten hours of deliberation, the jury returned a verdict in favor of the Plaintiffs on each of the two counts in the charge, professional malpractice and breach of fiduciary duty. In accordance with the verdict, the Court entered a Final Judgment directing that "each Plaintiff recover damages of $72,500.00 from Defendant Shelby Baucum," and that all court costs be assessed against Baucum; on March 27, 1996, the Court awarded Plaintiffs $20,023.09 in costs against him.

The parties have now filed four post-judgment motions which the Court must consider: (1) Shelby Baucum's Renewal of Motion for Judgment After Trial and Brief in Support, filed February 14, 1996; (2) Shelby Baucum's Motion for New Trial and Brief in Support, filed February 14, 1996; (3) Casa View Baptist Church's Motion to Amend Final Judgment and Brief in Support, filed February 14, 1996; and (4) Amended Brief in Support of Plaintiffs' Motion to Conform Final Judgment to Jury Verdict or, Alternatively, for New Trial, filed February 14, 1996. The Court will consider each of these motions in turn.

I

Renewal of Motion for Judgment After Trial

The Federal Rules of Civil Procedure provide that:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party

> with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable ruling on that issue.

FED. R. Civ. P. 50(a)(1). on January 23, 1996, at the close of all the evidence, Defendant moved for a judgment as a matter of law, arguing that the Free Exercise Clause of the First Amendment precluded a submission of any claim to the jury. After hearing oral arguments from both sides, the Court denied Defendant's Motion. Defendant now renews his motion for judgment as a matter of law pursuant to Rule 50(b), which provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of the judgment ... In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
> (A) allow the judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law.

FED. R. Civ. P. 50(b). In ruling on a motion for judgment as a matter of law, the Court is guided by the test first enunciated in this Circuit by Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), where the court stated that when considering a motion for judgment as a matter of law, a district court:

> [s]hould consider all of the evidence -

> not just that evidence which supports the non-mover's case - but in the light and with reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied...

Id., at 374-75. In other words, the Court must determine whether there is sufficient evidence to support the jury's verdict and in so doing, all evidentiary conflicts are to be resolved in favor of the successful party and that party is to be given the benefit of all reasonable inferences; fundamentally, the court must decide based on the evidence whether a reasonable jury could conclude as the jury did. Turner v. Purina Miffs. Inc., 989 F.2d 1419, 1421 (5th Cir. 1993).

In moving for judgment as a matter of law, the crux of Defendant's objection is that the First Amendment to the United States Constitution prohibits judicial review of the counseling relationship as found by the jury, and. forecloses any action for breach of fiduciary duty as found by the jury, because the evidence at trial allegedly demonstrated a mix of secular and religious counseling. Baucum also argues that the evidence does not support the submission of an interrogatory to the jury on the issue of counseling because it was not shown that Baucum's counseling was not part of the Church's religious beliefs and practices. For the reasons stated below, Baucum's most recent attempt to avail himself of the First Amendment's shield must fail.

A. Free Exercise Jurisprudence

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof ...*" *U.S.* Const, amend. I (emphasis added.) There is no debating that the Supreme Court has consistently recognized that the First Amendment has built a wall of separation between church and State; as the Fifth Circuit has observed, though the wall "between permissible and impermissible intrusion of the State into matters of religion may blur, or become indistinct, or vary, is does and must remain high and impregnable." McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972). A spirit of freedom for religious organizations, and a power to decide for themselves matters of church government as well as those of faith and doctrine is consistently reflected in the Supreme Court's decisions. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

Consistent with this philosophy, the Fifth Circuit has, on numerous occasions, declined to exercise jurisdiction over ecclesiastical matters which extend to the core of religious beliefs. For example, in McClure, 460 F.2d at 558, the court was presented with the question of whether Title VII applied to the employment relationship between a church and its ministers, and if applicable, whether the statute impinged upon the Religion Clauses of the First Amendment. The Fifth Circuit concluded that although Congress did not intend that religious organizations be exempt from Title VII liability, the application of Title VII would violate the Religion Clauses. Id. at 558. The court reasoned that to apply the strictures of the civil rights laws would infringe on decisions -- such as a minister's assignment, his salary or his duties -- which are "matters of church administration and government and thus, purely of ecclesiastical cognizance." Id. at 560. In essence, the court was concerned with preserving the religious freedom of churches and precluding civil court review of religious practices and decisions.

In Simpson v. Wells Lamont Corp., 494 F.2d 490, 493 (5th Cir. 1974), the court echoed this concern; in Simpson, the plaintiff was a pastor who brought a civil rights suit for damages resulting from his ouster by church officials. The court wasted no time in determining that it lacked jurisdiction to hear the pastor's case,

because it presented a purely ecclesiastical dispute, involving "a congregation's determination as to who shall preach from the church pulpit [which] is at the very heart of the free exercise of religion." Id. at 492. Again, the court was careful to avoid trampling on doctrinal beliefs and meddling with internal decisions of a religious society.

It is clear, then, that the Free Exercise Clause, upon which Baucum's defense is based, seeks to protect religious beliefs and religious conduct; it does not, however, purport to extend to secular beliefs and activities. In Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), the Supreme Court explained that "a way of life, however virtuous and admirable, may not be interposed as a barrier to a reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Causes, the claims must be rooted in religious belief." Nearly ten years later, the Court enforced this notion in Thomas v. Review Board of Indiana Employment Security Div., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.") (citing Sherbert v. Verner, 374 U.S. 398 (1963) and Yoder, 406 U.S. at 215-16).

The Free Exercise Clause also does not relieve an individual of the obligation to comply with neutral laws of general applicability. Employment Div. Dept of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990);[1] The Court has found that since such laws do not specifically endeavor to regulate religious conduct, they can be enforced even to proscribe (or prescribe) conduct which one's religion prescribes (or proscribes) without offending the First Amendment. See Church of Lukumi Babalu Ave. Inc. v. Hialeah, 508 U.S. 520 (1993); Smith, 494 U.S. 872. Similarly, the Supreme Court has held that since such laws do not have as their specific object the regulation of religious beliefs as such, they can be applied to resolve even internal

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[1] In Smith, the Court noted that "the only decisions in which [it has] hold that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Muse alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." Id. at 881 (citations omitted).

disputes within a church without offending the First Amendment. See Jones v. Wolf, 443 U.S. 595, 602-04 (1979) (holding that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S.440 (1968) (holding if intra-church property dispute required interpreting and weighing church doctrine, a court cannot not intervene; if, however, neutral principles of law could be applied without determining underlying questions of religious doctrine and practice, a court could intervene).

Because religious organizations do not enjoy absolute immunity from tort liability, it is not unprecedented to subject members of the clergy to liability for negligence, including standards of professional care and fiduciary duties. The cases demonstrate that if a clergyperson holds himself out as having the skill and experience of a secular professional and undertakes to provide a secular service, he can be held to the same secular standard of care by which secular professionals are held under similar circumstances. Moses v. Diocese of Colo., 863 P.2d 310, 320-21 (Colo. 1993), cert. denied, 114 S.CL 2153 (1994) (holding that actions against clergy members and their superiors that involve claims of breach of fiduciary duty ... are actionable); Doe v. Samaritan Counseling Cen., 791 P.2d 344 (Alaska 1990) (clinic could be liable under respondeat superior for mishandling of transference by pastoral counselor); Zakhortchenko v. Weinberger, 605 N.Y.S.2d 205, 206 (Sup. 1993) (rabbi who performs circumcisions as part of a Jewish ritual must meet standards of skill and care prevailing among secular professionals who perform circumcisions); Adams v. Moore, 395 S.E.2d 799, 801 (N.C. CL App. 1989), rev. denied, 389 S.E.2d 799 (1990) (preacher owed a fiduciary duty to a parishioner and violated that duty by using his position and influence to obtain the deed to the parishioner's home and then selling it for a quick profit); Erickson v. Christenson, 781 P.2d 383, 386 (Or. App. 1989) (holding a priest who abuses his role as counselor can be liable for breach of fiduciary duty).

It is because of these inherent limitations to the application of the Free Exercise Clause that we face the legal question presently before us. Not surprisingly, only a handful of courts have published

opinions addressing the specific issue presented in the case at hand; in Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994), the Seventh Circuit reviewed a district court's dismissal of an individual's complaint which alleged, among other things, professional malpractice and breach of fiduciary duty against her minister. The plaintiff, Dausch, claimed that she sought counseling from Reverend Rykse, who allegedly "engaged in dangerous and improper counseling relations" with her, which included "engaging in sexual contact during the course of psychotherapy." Id. at 1427. The district court had dismissed the complaint as essentially stating a claim for clergy malpractice. In assessing her complaint the circuit court concluded that she had in fact stated a valid claim for professional malpractice.[2] The Dausch court reaffirmed that a claim for clergy malpractice has been uniformly rejected by the states which have considered it, but observed that

> This judicial refusal to examine the pastoral activity of members of the clergy, when such a judicial inquiry would require examination and evaluation of the clergy's adherence to the tenets of his or her faith or of internal decisions and organization of the church, has not been extended to situations in which the conduct in question does not bear such a direct relationship to the doctrinal or organizational aspects of religious practices.

Id at 1432. Despite the nonrecognition of clergy malpractice in Illinois, the court noted that state's law recognizes a cause of action for counseling (psychotherapy) malpractice, because it "does not implicate judicial assessment of the tenets of a particular religion or a determination of whether a particular litigant has adhered to those

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[2] The court rejected Plaintiff's claim for breach of fiduciary duty because it was alleged to have occurred in the context of a pastor-parishioner relationship, and would have "required the court to define the scope of a fiduciary duty owed persons by their clergy, a matter clearly rooted in the tenets and internal organization of a religion." Id. at 1438.

tenets. Rather, the sole inquiry is whether the individual has engaged in conduct that the state has deemed harmful." Id. at 1433. The court stated that when a plaintiff alleges that the counseling was secular in nature, or that the provider held himself out to be providing the service of a psychological counselor, the negligence claim cannot be characterized as one for clergy malpractice. "Tort claims for behavior by a cleric that does not require the examination of religious doctrine," the court concluded, "are cognizable." Id.

The Supreme Court of Colorado has also considered this issue and found that clergymembers are not completely insulated from liability by the First Amendment's Free Exercise Clause for conduct which arises in the context of a counseling relationship. Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988).[3] The court declared that "members of the clergy cannot, in all circumstances, use the shield of the First Amendment as protection and as a basis for immunity from civil suit." Id. at 284 (citations omitted). Citing Abington School District v. Schempp, 374 U.S. 203 (1963), the court stated that a party challenging governmental action as an infringement of his free exercise rights must show that their is a coercive effect against his practice of religion. Id. at 283. The threshold question, then, is whether the conduct of the defendant is religious; the Destefano court found that the Grabrian's conduct was not. The court noted that

> if the alleged conduct of Grabrian was dictated by his sincerely held religious

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[3] The Court allowed the plaintiff to proceed With a claim for breach Of fiduciary duty against the priest, but not for professional malpractice. It appears that the Destafano court's decision to dismiss the professional malpractice claim was based on Colorado law, which expressly evinces an intent to exclude religious ministers, priests and rabbis from the statutory scheme which imposes liability upon mental health professionals for malpractice. Therefore, die court reasoned, plaintiff's claim could be nothing but one for clergy malpractice. Id. at 286.

In this case, at the time Plaintiffs filed their lawsuit, there was no applicable state statute. Since that time, the Texas legislature has enacted a law which covers liability for sexual exploitation in counseling in a professional relationship, including a clergy member's assistance to an individual resolving emotional, attitudinal, or relationship conflicts. See TEX. CIV. PRAC. & REM. CODE §81.001 *et seq*.

> beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue. This, however, is not the case. It has not been asserted that Grabrian's conduct falls within the practices and beliefs of the Catholic church ... As such, the conduct upon which [plaintiffs claim] is premised is, by definition, not an expression of a sincerely held religious belief. ...

Id. at 284.

B. The Jury's Verdict

In this case, the Plaintiffs' claims, and more importantly the jury's verdict, are squarely in line with Supreme Court Free Exercise jurisprudence, Fifth Circuit precedent, and several courts who have expressed an opinion on this issue. First, the charge itself made it clear that the jury could not base liability on clergy malpractice or on religious counseling. The charge explicitly stated that courts do not recognize a cause of action for clergy malpractice, and that as a result, Plaintiffs' first cause of action only encompassed malpractice in secular counseling and did not apply to religious or spiritual counseling. (Court's Charge to the Jury at 9). After having been informed of these boundaries, and the prohibition against the clergy malpractice cause of action, the jury was specifically asked "if you find that a counseling relationship existed, do you find that such counseling relationship was essentially *secular marital or mental health counseling in nature?*" (Court's Charge to the Jury at 14) (emphasis added). If the jury had answered "no" to this question, they were instructed to proceed to the certificate page of the charge, and find no liability. The jury, however, found that the counseling was secular, this conclusion is entirely consistent with the evidence presented at trial. The testimony painted a clear picture of secular counseling, and Baucum's attempt to characterize it otherwise did not persuade the jury, and it does not sway the Court now.

Robyn Sanders testified that her counseling sessions began in March of 1990 and ended in September of 1991; she also testified that the sessions would occur at least once a week. Over the course of these nineteen months, Sanders had at least 150 sessions with Baucum. Sanders also testified concerning the topics which were covered during these counseling sessions; she and Baucum discussed matters ranging from her marital, financial, emotional and sexual problems to her concerns about her career, her children, and her academic pursuits. She explained that Baucum gave her advice and offered his opinions as to each of these area , ~~s~~suggesting ways to improve her self-esteem, how to sustain her marriage, or how to best cope with her financial troubles.

There was no evidence at trial that Baucum quoted Bible passages or made reference to religious materials during these sessions. She testified that they never prayed together, and that she did not remember Baucum quoting scripture; in short, they did not broach religious topics. Although the Defense points out that Sanders testified on cross-examination that Baucum provided her with pastoral counseling, she later explained her own definition of pastoral counseling as simply "when a pastor counsels." She also stated that Baucum did not provide her with spiritual, or religious, counseling. She revealed that she had received spiritual counseling in the past from Sunday School Teachers and from other ministers, but at several different points in her testimony she stressed that she did not receive such counseling from Baucum. Thus, there was ample, detailed testimony and evidence at trial from which the jury could find that the counseling relationship was secular in nature.

With respect to Cynthia Mullanix, much the same evidence was presented. Her marital counseling relationship with Baucum occurred during the period between November 1990 and September 1991; they met regularly during these eleven months, sometimes several times a week. She testified that during these sessions, they discussed a broad range of topics, including her marriage to her current husband, incidents of childhood sexual abuse, financial problems, work, and her children. She also stated that Baucum gave her advice and opinions, all of which could be expected from a secular, mental health counselor: assistance with her self-esteem,

recommendations about how to preserve her marriage, and reminders about the importance of continuing with counseling.

She also testified that prior to the secular counseling sessions, she had approached Baucum on religious matters because she was a member of Church-related groups, such as the Women's Missionary Union, Girls Union and an adult Sunday School class; these discussions with Baucum she characterized as involving religious or spiritual counseling. Mullanix explained, however, that when she later began to meet with Baucum for secular counseling, he did not mention the Bible or make religious references in the context of the marriage counseling."[4] Thus, there was substantial evidence that during the relevant time period, between November 1990 and September 1991, the counseling relationship was secular in nature; as with Sanders, this was a reasonable conclusion for the jury to reach, given the evidence.

Second, the causes of action, the jury charge and the verdict are in line with Supreme Court and Fifth Circuit law which cautions against civil courts making determinations on questions of religion. As the court recognized in Schmidt v. Bishop, 779 F. Supp. 321, 327 (S.D.N.Y.). "tort claims for behavior by a cleric that does not require the examination of religious- doctrine are cognizable." In this case, the jury was not asked any questions which touched on spirituality or religious matter, thereby entangling the civil court with interpretation or analysis of religious doctrine. See Lemon v. Kurtzman, 402 U.S. 602 (1971). The jury was not asked to judge the propriety of any religious matters; the members of the jury were not asked to pass on whether Baucum referred the Plaintiffs to wrong or misleading Bible passages, or whether he doled out adequate and helpful religious advice. They were not asked to decide whether he provided them with

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[4] On January 12, 1996, during re-direct examination, Mullanix gave the following testimony:

Q: Did [Baucum] ever, at any time throughout the entire time of your counseling relationship, reference scripture in relationship to your marriage to [your husband]?
A: No.
Q: With respect to your relationship to your children?
A: No.
Q: With respect to your childhood abuse?
A: No.

sound spiritual guidance. The complaint as construed by the Court, the testimony at trial, and the jury charge suggested no such claims.

Instead, the jury's assessment followed a neutral-principles approach that was completely secular in operation; the jury was asked to evaluate the actions of Baucum independent of any religious considerations. Unlike Simpson or McClure where the court concluded that the plaintiffs' claims would necessarily involve determination of religious issues, the claims in this case were resolved on the basis of neutral principles of law which were applied without establishing any particular view or interpretation of religious doctrine. Simpson, 494 F.2d at 493; McClure, 460 F.2d at 560. The jury was asked to determine issues that were quite apart from religion or religious beliefs. The charge asked them to determine whether Baucum was liable for counseling malpractice and whether he breached fiduciary duties owed to the Plaintiffs as a result of the secular counseling relationships, both of which are questions which turn on neutral principles of tort law. The jury concluded that Baucum had presented himself as a competent marriage counselor, had initiated a secular counseling relationship with Plaintiffs, was negligent in performing such counseling, and thereby caused harm to the Plaintiffs; thus, Baucum was held to the standards required by the civil law of all who undertake the sensitive task of counseling. The causes of action, the charge and the jury's verdict, therefore, do not run afoul of the Free Exercise Clause.

Finally, as the court noted in its summary judgment, "if Plaintiffs' allegations are true, Baucum's preying on [women], masqueraded in the form of marriage counseling, constitutes conduct that is not subject to First Amendment protection. Certainly such conduct is not part of the beliefs and practices of Casa View." Sanders, 898 F. Supp. at 1174. In the end, the evidence at trial supported these allegations. As the court observed in Destefano, "the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact part of the belief and practices of the religious group." 763 P.2d at 283. The actions of Baucum can hardly be considered part of the 'Baptist faith; in this case, the evidence was clear that Baucum's conduct, of which Plaintiffs complain, was not religious, and does not entitle him to a

Free Exercise defense.

In light of the evidence presented at trial, there can be no question as to the propriety of the jury's verdict, and their conclusion that the counseling relationship was of a secular nature; clearly, the test enunciated in Boeing is met. Given the testimony at trial, and weighing the credibility of the witnesses, it is clear that the jury reached a reasonable a conclusion concerning the nature of the counseling, and rendered it its verdict based on the secular counseling relationship and not on religious considerations. Defendant's Renewed Motion for Judgment as a Matter of Law is therefore DENIED.

II

Motion for New Trial.

The Federal Rules provide that "a new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial. by jury, for any of the reasons for which new trials have been granted in actions at law in the courts of the United States." FED. R. CIV. P. 59(a). Generally, the determination as to whether a new trial should be granted is within the sound discretion of the trial court. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) (stating rule); Weaver v. Amoco Prod. Co., 66 F.3d 85 (5th Cir. 1995)(district court's ruling on motion for new trial is reviewed only for abuse of discretion, and district court is given greater deference when motion is denied, leaving the jury's determinations undisturbed).

A. General Objections

Pursuant to this rule, Baucum moves for a new trial on numerous grounds. First, in brief and unsupported assertions, Defendant claims that he is entitled to a new trial on the grounds that (I) the verdict is contrary to the law; (ii) the verdict is contrary to the evidence; (iii) the evidence is totally insufficient to show any liability on the part of the Defendant, and there is no evidence to sustain the verdict of the jury; and (iv) the evidence as considered in its most favorable light on behalf of the Plaintiffs is insufficient to support any verdict that might be rendered for the Plaintiffs against Defendant. (Def.'s Mot. for New Trial at 1) This is the extent of Baucum's argument; he completely fails to provide the Court with supportive reasoning or with references to the record which would justify these

claims. In other words, he has suggested nothing which undermines the merit of the jury's verdict. The Court has thoroughly reviewed the transcripts of the trial and finds that there was ample evidence presented at trial which could have led the jury to find Baucum liable on the charges of professional malpractice and breach of fiduciary duty, and the verdict is surely not against the great weight of the evidence. Eyre v. McDonoough Power Equip., 755 F.2d 416 (5th Cir. 1985) (deference is accorded trial judge's firsthand opportunity to view witnesses and their demeanor, and to determine whether to grant motion for new trial if verdict is against the great weight of the evidence.) Thus, the Court finds no merit to these objections.

B. Verdict was Excessive

Defendant also claims that the verdict of the jury was excessive and appears to have been rendered under the influence of passion and prejudice. It is well established, however, that a strong presumption exists in favor of affirming a jury award of damages, and a verdict will be overturned only upon a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice. Eiland v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995) (quoting Westbrook v. Gen. Tire and Rubber Co., 754 F.2d 1233, 1241 (5th Cir. 1985). This Circuit's case law provides that a verdict is excessive only if it is "contrary to right reason" or "entirely disproportionate to the injury sustained." Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983). Likewise, Texas law allows a punitive damage award *to* be overturned where it is so excessive as to be manifestly unjust. Tran.v. Ins., Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994). In judging the reasonableness of an award of punitive damages, the Texas Supreme Court instructs the court to consider (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which the defendant's conduct offends the public sense of justice and propriety. Alamo Nat'l Bank of San Antonio v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981).

Against this legal backdrop, the Court concludes that the jury's verdict in this case was not excessive, and there is no evidence to suggest that the verdict is the result of the jury's passion rather than

its reasons. Plaintiffs' Second Amended Complaint requested $1 million in compensatory damages and $4 million in punitive damages for each Plaintiff. In counsel's closing argument for Plaintiffs, he estimated the expenses that each Plaintiff had accumulated in psychological and medical care, and then entreated the jury to use the monetary damage award to send a strong message to Shelby Baucum, and other counselors, that it is "unacceptable to cross the fine and destroy people's lives." In the end, the jury awarded each Plaintiff $30,000.00 in compensatory damages and $85,000.00 in punitive damages; needless to say, this was but a small portion of what they had requested, or perhaps even expected.

The Court also finds that the punitive damage award is reasonably proportioned to the actual damages; the ratio of punitive damages to actual damages in this case is less than 3:1, which is well within the bounds of reasonableness. Brown v. Petrolite Corp., 965 F.2d 38, 49 (5th Cir. 1992) (upholding a 12:1 ratio of punitive damages to actual damages); Glassock v. Armstrong Cork Co., 946 F.2d 1085, 1096 (5th Cir. 1991) (upholding 20:1 ratio of punitive damages to actual damages), cert. denied sub nom, Celotex Corp. v. Glassock, 112 S.Ct. 1778 (1992).

Evaluating each portion of the jury's award, the Court is convinced that the jurors weighed the evidence fairly, found Defendant liable, and awarded damages accordingly. The amount of money awarded by the jury was obviously not excessive or unreasonable given the circumstances of this case, the nature of Baucum's conduct, and the effect which his actions had upon the Plaintiffs. Defendant's Motion for New Trial on this ground is denied.

C. Objections to Testimony

Defendant suggests that reversible error was committed when Plaintiff Robyn Sanders, in alleged violation of the motion in limine, made reference to other women who may potentially have been involved with Baucum,[5] and when Dr. Valerie Sheehan began to make

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[5] Specifically, an January 9, 1996, while on direct examination, Sanders testified:

> I thought about how [Baucum] had approached me about counseling. All the descriptions [Cynthia Mullanix] gave

a similar comment during her testimony.[6] At the trial, the Court denied Baucum's motion for a mistrial, presenting several reasons why these vague and ambiguous references did not warrant a new trial. For example, the Court stated that Sanders' remark did not rise to the level of a mistrial, given that there was already testimony that Baucum had been counseling other women at the Church. The Court also explained that Sanders' testimony was not a clear violation of the language of the motion in limine, considering that she was not testifying as to a specific claim anyone had made against Baucum, but was only relaying her own observations of his interactions with other women in the Church. Similarly, when the defense moved for mistrial after Dr. Sheehan's testimony, the Court again denied the motion as inappropriate, in large part because the question of Baucum having engaged in other affairs was still an open issue; the Court observed that evidence about Baucum having sexual affairs with other women was likely to come in at some point in the trial."[7]

Thus, at the time of trial, the Court did not consider these to be appropriate grounds for a new trial. In renewing his objection, Defendant has failed to meet his burden of demonstrating that this

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> me about how their relationship had become sexual, and it related to mine, and I darted thinking about all the women I saw going in and out of his office every day, the women he told me he was counseling, the things that he told me from those counseling session, and I felt like we were not the only victims.

[6] On January 16, 1996, Dr. Sheehan, one of Robyn Sanders' psychiatrists, was testifying as to some of what Sanders told her about the sexual relationship with Baucum, and testified:

> She went into some detail. I asked some questions; how did it come about, how long had this been going on, and what was the most recent problem with it. And she told me that it had been going on about a year, maybe a little more, and that he was also having an affair with her best friend, [Cynthia Mullanix]. This was very shocking to her. She was devastated with this knowledge. Then she discovered he's been having affairs with other -

[7] In the end, another woman did testify during Plaintiffs' rebuttal case as to her sexual relationship with Baucum.

testimony warrants a new trial; he simply contends that these instances "caused unfair prejudice, confusion of the issues, and mislead the jury," without offering any evidence or proof of such an effect. Therefore, this objection is overruled.

Defendant also alleges that the Court erred in permitting Jana Martin to testify as a rebuttal witness concerning her sexual relationship with Baucum. The Court went to considerable effort at the time of trial to articulate why Ms. Martin's testimony was relevant and admissible under FED. R. EVID. 404(b) and 415. During a bench conference on January 24, 1996, the Court articulated its reasons as follows:

> The reason I think it is admissible, and we discussed this yesterday, I think it is a 404, and you do get the balancing, but the testimony, as I understood up to now, is Mr. Baucum is denying there was any kind of counseling relationship, any kind of a sexual relationship, and that one of the reasons he wouldn't have had the sexual relationship was because he was impotent, and second, because he's been faithful to his wife for how ever long they've been married, 30-something years, and he's a minister, and I think that goes to all of that.
>
> It goes to the issue of whether or not there was sexual conduct with the Plaintiffs. I think its probative on that issue. It's probative on the issue of the fact he says he couldn't have had [sexual intercourse] because he was impotent, because they overlap, and this lady has testimony through her affidavit that, in fact, he wasn't impotent. And then that he says he

> wouldn't have done it because he's been faithful to his wife, and this goes directly to that issue as well.
>
> And I do think, based on the affidavit that I have, that there are similarities ... You can explore that certainly, but I think all those issues go to the weight, as far as my consideration in deciding admissibility. They are similar in the sense he is approaching women that he knows are in some type of distress, we in an emotional state, whether it was marital problems or this Ms. Martin who had a broken engagement, and so he's aware of those situations, and he's approaching them, and it turns into a sexual relationship. That's apart from whether there was any counseling or not; obviously, there are so many issues here, but I think its similar enough and [given] those other issues that I mentioned I think it's admissible. I'm going to let it in.

For all of the reasons stated above, the Court finds that the testimony of Jana Martin was clearly admissible under the Rules of Evidence and does not provide Defendant grounds for a new trial.

Defendant also complains of the prejudice that occurred when counsel for Plaintiffs inadvertently mentioned the word "insurance" allegedly within the hearing of the jury.[8] There is no evidence in the record that any member of the jury heard Mr. Eisenbraun's instruction to the witness. In fact, the Court, as well as Plaintiffs' other counsel, stated on the record that they did not hear the comment. Additionally,

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[8] On January 16, 1996, during a side-bar, Mr. Eisenbraun was instructing one of the Plaintiffs' witnesses that she was not to mention anything about insurance or the existence of a insurance policy during her testimony.

given the reasonable amount of damages awarded by the jury, it is not likely that their verdict was effected in any way by this occurrence. Finally, Plaintiffs' counsel points out that "even when the jury was asked during post-verdict interviews by Baucum's counsel whether anyone heard the word 'insurance' during such testimony, the answer was no." (Pls.' Br. in Opp. to New Trial at 2). Thus, the Court finds no reason for awarding a new trial on this ground.

D. Objections to Jury Charge

Defendant also lodges numerous objections to the jury charge. First, he takes issue with the instructions and questions regarding professional malpractice on the ground that there are no pleadings to support these instructions. This objection has previously been addressed by the Court; in its earlier summary judgment opinion, the Court explicitly stated that although Plaintiffs' Complaint labeled their claim as one for "negligence (malpractice in Baucum's pastoral counseling)," the Court will construe the claim based on the facts alleged as one for professional malpractice by a marriage counselor." Sanders, 898 F. Supp. at 1175, citing FED. R. Civ. P. 8(f). See also Schiavone v. Fortune, 477 U.S. 21 (1986) (quoting Rule 8(f) and emphasizing that the "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts"); Farina v. Mission Inv. Trust, 615 F.2d 1068 (5th Cir. 1980) (citing Rule 8 for the proposition that the federal pleading rules are not excessively technical). Given the Court's previous ruling on this issue, it is clear that there is no merit to this objection to the charge.

Next, Defendant objects to the breach of fiduciary duty claim on the basis that it is "clearly grounded in an alleged clergy/pastoral counseling relationship for which there is no cognizable cause of action." As the Court explained in its earlier summary judgment opinion, however, the nature of the marriage counseling relationship between Baucum and Plaintiffs was an issue of fact to be determined at trial. Sanders, 898 F. Supp. at 1176; Destefano v. Grabrian, 763 P.2d 275, 283 (Colo. 1988). In this case, after three weeks of testimony from numerous witnesses, the jury ultimately found that a counseling relationship existed between the parties, that it was secular in nature, that this relationship gave rise to a fiduciary relationship,

and that Baucum breached his fiduciary duties to Plaintiffs.

Moreover, the jury charge makes it clear that the basis for the fiduciary relationship could not be a pastoral counseling relationship; the charge outlines the cause of action for breach of fiduciary duty, stating that the jury must consider whether Defendant "is liable for breaching
fiduciary duties owed to the Plaintiffs in providing secular marital or mental health counseling." (Court's Charge to the Jury at 16). In addition, the jury was instructed that "a fiduciary relationship cannot arise solely out of a minister-parishioner relationship." (Id.) Finally, the charge enumerated the elements of the cause of action, stating that the jury must first find, by a preponderance of the evidence, that a fiduciary relationship existed between Defendant and each Plaintiff which arose from a counseling relationship which was secular in nature. (Id. at 18) Thus, the charge made it clear that the jury was to base any finding of liability on the existence of a secular counseling relationship, not a pastoral counseling relationship; absent evidence to the contrary, the Court must presume that the jury properly followed its instructions. McMullin v. Palmer, 40 F.R.D. 368 (N.D. Miss. 1966). Defendant's objection is overruled.

Next, with respect to the professional malpractice and breach of fiduciary duty claims, Defendant alleges that (I) there is no adequate definition of the reasonable duty standard against which Defendant's alleged conduct could be measured or evaluated, (ii) these claims represent the impermissible submission of a clergy malpractice claim, (iv) the claims are an impermissible attempt to recover damages for seduction and/or alienation of affection in violation of Texas law and failure to instruct the jury not to consider damages for alienation of affection and/or seduction constitutes reversible error.

An analysis of the charge reveals that it does contain adequate definitions of the standard of care. For example, the professional malpractice section of the charge contained a separate section which specifically defined the standard of care applicable to this cause of action. (Court's Charge to the Jury at 10). The instruction explained what would constitute negligence under this standard, and provided the jury with a proper and adequate basis upon which to judge the

Defendant's conduct. Similarly, for the breach of fiduciary duty claim, the charge included a section detailing the cause of action, explaining the duties owed by Defendant, and the necessary elements of the cause of action. (Id. at 16-18). There is absolutely no evidence that the jury was confused or mislead as to the standard of care to be applied; thus, Defendant's objection on this ground is overruled.

The Court has already ruled on Defendant's contention that Plaintiffs' claims were essentially clergy malpractice claims; when the parties moved for summary judgment nearly two years ago, Defendant offered the same argument, which the Court rejected. At the time, the Court allowed the claims for professional malpractice and breach of fiduciary duty to proceed to trial, because courts recognize causes of action for counseling malpractice and breach of fiduciary duty. Sanders, 898 F. Supp. at 1174-76; See Federal Savings and Loan Ins. Corp. v. Texas Real Estate Counselors, 955 F.2d 261 (5th Cir. 1992); St. John v. Pope, 901 S.W.2d 420 (Tex. 1994); Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp, 823 S.W.2d 591 (Tex. 1992). They are separate and distinct causes of action which provide Plaintiffs with cognizable legal claims against Baucum. Further, as the Court explained in greater detail in the previous section regarding Defendant's Motion for Judgment After Trial, Plaintiffs' claims are not claims for clergy malpractice, but are distinct causes of action for negligence in secular counseling and breach of fiduciary duties. Thus, the Court finds no merit to this objection to the charge.

Defendant's final objection, that Plaintiffs' claims are merely an attempt to recover damages for seduction and/or alienation of affections, is also meritless. As an initial matter, the Court notes that it is well aware that these causes of action no longer exist under Texas law. Scoggan v. Texas, 799 S.W.2d 679 (Tex. Crim. App. 1990) (penal offense of seduction ceased to exist in Texas as of January 1, 1974); Truitt v. Carnley, 836 S.W.2d 786 (Tex. App. -- Ft. Worth 1992, writ denied); TEX. FAM. CODE ANN. §4.06 ("a right of action by one spouse against a third party for alienation of affection is not authorized in this state"). A careful analysis of these causes of action, however, makes it abundantly clear that Plaintiffs' claims are not merely claims for seduction or alienation of affections. The section of the 1911 Texas Penal Code pertaining to seduction provided that

"if any person, by promise to marry, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished." Holladay v. Texas, 709 S.W.2d 194, 205 n.3 (Tex. Crim. App. 1986). Prior to its abolition, the gist of the alienation of affection action was:

> the intentional or purposeful alienation of the affections of one spouse from the other; the damage, if any, in such a case is for loss of consortium; to establish a cause of action it is not necessary that there be a loss of all elements included in that term, but that any substantial impairment thereof, through unjustified intentional conduct, creates a cause of action in favor of the spouse damaged against the offender in this respect.

Stites v. Gillum, 872 S.W.2d 786, 790 (Tex. Civ. App. -- Fort Worth) (quoting Williams v. Rearick, 218 S.W.2d 225, 229 (Tex. Civ. App. -- Amarillo 1949, no writ)). It is clear, given the elements of these so-called heart-balm actions, that the Plaintiffs' claims are not an attempt to recover damages for these abolished causes of action. The Plaintiffs' Complaint does not include allegations to support these causes of action and the evidence presented at trial obviously did not suggest a claim for seduction or alienation of affections; rather, the essence of the Plaintiffs' claims is Baucum's departure from proper standards of counseling practice. See Destefano, 763 P.2d at 280. Therefore, the jury was specifically instructed on professional malpractice and breach of fiduciary duty, both of which were supported by the evidence presented at trial which established that Baucum purported to be an experienced marital counselor, entered into a secular counseling relationship with Plaintiffs, and breached standards of care as a counselor and fiduciary. (Court's Charge to the Jury at 9-12; 16-18).

Finally, Defendant maintains that the Court wed in refusing to instruct and submit to the jury the defensive issue of waiver as requested by Defendant for reason that sufficient evidence supported

the same. Baucum does not, however, cite any authority regarding the issue of waiver nor does he articulate how the Court's refusal to instruct the jury regarding waiver effected the outcome of the case. In the absence of such a showing, no new trial is warranted. Defendant having failed to raise any objections which would entitle him to a new trial, the Court finds that his Motion for New Trial should be DENIED.

III

Motion to Conform Final Judgment to Jury Verdict

As previously mentioned, on January 25, 1996, the jury entered a verdict in favor of each plaintiff on their tort claims of professional malpractice and breach of fiduciary duty; the jury also found that Baucum was grossly negligent as to each claim.[9]

Concerned about the possibility of double recovery, in its Final Judgment the Court directed that each Plaintiff recover $72,500.00 from Baucum, which represented $30,000.00 compensatory damage award and $42,500.00 in punitive damages. Having revisited the issue and considered the punitive damages more thoroughly, the Court finds that each Plaintiff is entitled to recover $85,000.00 in punitive damages.

First, the conduct which the awards purportedly sought to punish and deter was different. The professional malpractice claim was based upon Baucum's breach of professional standards of conduct applicable to secular marital or mental health counselors.[10]

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[9] The amount of money awarded by the jury was allocated as follows:

Damages	Robyn Sanders	Cynthia Mullanix
Past Mental & Emotional Anguish	$20,000.00	$20,000.00
Future Mental & Emotional Anguish	$5,000.00	$5,000.00

(continued ...)

[10] In addition to initiating a sexual relationship with Plaintiffs, the testimony at trial also established that Baucum breached the applicable standards of care under the tort of professional malpractice in several other ways, including (1) failure to refer Plaintiffs to another counselor, (2) expressions of love and affection toward them, (3) failure to redirect attention back to counseling when they expressed love and affection toward him, and (4) threats.

On the other hand, the breach of fiduciary duty claims were based upon Baucum's breach of the higher duty to act solely in the interests of the Plaintiffs, by virtue of the position of power and trust he had engendered as their counselor. More specifically, this claim was based upon his disclosure of confidential information, not solely on the sexual relationship which developed during the counseling relationship. These differences are also evidenced by the specific jury instructions on each claim. The charge was divided into sections, isolating each cause of action and instructing the jury as to its elements and the Defendant's respective duties. It is evident in this case that the jury's deliberations were directed to two different torts, each of which supports an award of punitive damages.

Moreover, as Plaintiffs correctly point out in their Motion to Conform the Final Judgment to the Jury Verdict, there is no Texas law which prohibits a jury from awarding punitive damages separately for each proven tort. See TEX. CIV. PRAC. & REM. CODE ANN. §41.001 *et seq.* (Vernon Supp. 1994). Unlike compensatory damages, which are limited by the principle of one recovery per injury, punitive damages are guided by the twin goals of punishment and deterrence. Moriel, 879 S.W.2d at 16. As further support for this proposition, Plaintiffs point out that the Fifth Circuit sanctions the practice of permitting a jury to award separate punitive damage awards for each proven claim. See Fifth Circuit Pattern Jury Instructions, Civil Cases (1995 Ed.) §15.14. This Section provides:

> You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he has lost Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully

for all of his injuries.

> *With respect to punitive damages. you may make separate awards on each claim that plaintiff has established.* (emphasis added).

In this case, the jury was instructed to do exactly that: the charge informed the jury that for each claim which you have found, by a preponderance of the evidence, that Defendant is liable for gross negligence, you may also award punitive damages." (Court's Charge to the Jury at 28). The interrogatories asked the jury to determine, for each claim, whether gross negligence had been proven. (Id. at 15, 2 1). The jury then proceeded to award each Plaintiff $42,500.00 in punitive damages for the professional malpractice claim and $42,500.00 in punitive damages for the breach of fiduciary duty claim. (Id at 29).

Absent a showing that a punitive damages award unreasonably "exceeds an amount that will accomplish society's goals of punishment and deterrence," or is somehow violative of due process, the Court should respect the jury's imposition of damages. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984) ("Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury"). In this instance, where it is obvious that the punitive damages award is not excessive, and the punitive damages are reasonably proportioned to the actual damages,[11] the Court should make every effort to abide by the intent of the jury. As Plaintiffs observe, the jury's award reached increments of only $500.00, suggesting that they split the amount of damages which they would have awarded in the aggregate. This, coupled with the structure of the charge, which informed the jury that may award a separate amount of punitive damages for each claim, suggests that the jury intended for each Plaintiff to recover $85,000.00 in punitive damages.

As there is no other reason for the Court to alter the punitive damages awarded by the jury, given the clear reasonableness of the award, the Court finds that each Plaintiff is entitled to recover

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[11] See discussion in Section II B above.

$85,000.00 in punitive damages. Therefore, Plaintiffs' Motion is GRANTED and the Court will enter an Amended Judgment to reflect these damages. Each Plaintiff shall recover a total of $115,000.00 in damages from Defendant Baucum, representing the $30,000.00 in compensatory damages and $85,000.00 in punitive damages awarded by the jury.

IV

Motion to Amend Final Judgment

Defendant Casa View Baptist Church now asks the Court to reconsider its decision to tax all court costs against Baucum and amend the Judgment so that the Church can recover its costs of court from Plaintiffs. The Church suggests that it is entitled to such relief because the Court previously awarded summary judgment in its favor on all of Plaintiffs' claims. Sanders, 898 F. Supp. 1169. Plaintiffs object to this motion on the ground that the Church engaged in excessive and expensive discovery, noticing and taking numerous deposition which were not "referred to or otherwise utilized in the Summary Judgment proceedings." Plaintiffs also suggest that the issues in this case are so intertwined that it would be virtually impossible to segregate which costs are attributable to Plaintiffs' claims and which are the consequence of Baucum's cross-claims.

In ruling on the Church's motion, the Court is guided by Federal Rule 54 which provides that "costs other than Attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." FED. R.. CIV. P. 54(d)(1). The specific issue of prevailing party status was addressed in Sheets v. Yamaha Motors Corp., 891 F.2d 533, 539 (5th Cir. 1990), in which the court noted that the issue of costs is in the discretion of the trial court, but that was prevailing parties, defendants enjoy a strong presumption that they will be awarded costs." Although none of Plaintiffs' claims, as counsel for the Church suggests, were "meritless on their face," it is clear that the Church prevailed on each of the claims against it, including Plaintiffs' claims and Baucum's cross-claims. Sanders, 898 F. Supp. at 1182-83.

The Court finds, therefore, that Casa View Baptist Church is entitled to collect costs from Plaintiffs, but only to the extent that such costs can be directly attributed to Plaintiffs' claims against the Church; the

Church is left to recover the remainder of its costs, which resulted from Baucum's cross-claims for breach of contract and wrongful termination, from Baucum.[12] The Court will enter an Amended Judgment to that effect.

V

Conclusion

Having considered each of the post-judgment motions, and the applicable case the Court finds that:

Defendant's Motion for Judgment as a Matter of Law is DENIED,

Defendant's Motion for a New Trial is DENIED,

Plaintiffs' Motion to Conform the Judgment to the Verdict is GRANTED, and

Casa View Baptist Church's Motion to Alter the Judgment is GRANTED.

So Ordered.

Signed this 7th day of June, 1996.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

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[12] In response to plaintiffs' concerns about the breadth of the Church's discovery, the Court notes that its decision today merely addresses the Church's right to recover costs from Plaintiffs; it obviously does not speak to the amount of costs to which the Church may be entitled. In submitting its Bill of Costs, the Church must obviously conform to the strictures of 29 U.S.C. 11920; and in reviewing the Bill of Costs, the Court also will abide by the relevant statutory framework and case law in determining to what extent the Church's costs are recoverable.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10870

ROBYN SANDERS; CYNTHIA MULLANIX
Plaintiffs - Appellants - Appellees

V.

CASA VIEW BAPTIST CHURCH, ET AL
Defendants

CASA VIEW BAPTIST CHURCH
Defendant - Appellee

SHELBY BAUCUM
Defendant - Appellant

U.S. COURT OF APPEALS
FILED
MAR 26 1998
CHARLES R. FULBRUGE III
CLERK

Appeals from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, BENAVIDES and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

"s/ Fortunato Benavides"
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR THE STAY OF THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10870

ROBYN SANDERS; CYNTHIA MULLANIX,
Plaintiffs-Appellants-Appellees,
v.
CASA VIEW BAPTIST CHURCH, ET AL.,
Defendants,
CASA VIEW BAPTIST CHURCH,
Defendant-Appellee,
SHELBY BAUCUM,
Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

EXCERPTS FROM TRIAL TRANSCRIPT

VOL. 2 PAGE 157 LINES 18-25

Q Would you agree that counseling is listening to problems of parishioners and giving spiritual guidance and guidance in solving or coping with problems?

A Yes.

Q And is that what you define as pastoral counseling?

A When you add the spiritual problems, spiritual guidance in there, yes.

Q Okay. And is that what Shelby Baucum was providing to you

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was pastoral counseling as per your definition?

A From time to time he would bring up spiritual aspects.

Q Ms. Sanders, do you remember giving your deposition in

this case?

A Yes.

Q Were you under oath, sworn to tell the truth?

A Yes.

Q Do you remember being asked to define the counseling that you were given by Shelby Baucum?

A Yes.

Q Do you remember what that deposition— that definition was?

A I believe you just read it.

Q And when I asked you if Shelby Baucum was providing pastoral counseling to you as per your definition, what was your answer, do you remember?

A Yes.

Q What was that answer?

A It was yes.

Q It wasn't sometimes, it was yes, wasn't it?

A That's correct.

Q When Shelby– When you told Shelby Baucum about all of these problems– I want us to go back through these and I want to ask you what guidance or advice he gave in solving or coping with these problems. First was the financial withdrawal. How

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Q did he tell you, or what advice did he give you in coping with this problem?

A He said that Casa View Baptist Church would provide me a job that would allow me to cope with the financial problems.

Q Okay. And did you consider this pastoral counseling as per your definition?

A I considered it counseling. Today I consider it counseling.

Q Now, let me ask you what you considered it at the time and at the time of your deposition back in 1993.

A I've had almost three years to think about this.

Q What did you say back in 1993 was your definition of the counseling that he gave you?

A That it was pastoral counseling.

Q So what has changed your mind between 1993 and today?

A I've looked at Shelby's counseling. He was my pastor. I trusted him, first off because he was my pastor. Secondly, because he was my counselor. And I cannot separate the fact that he was my counselor and he was my pastor. Some of the time–

Q It's hard–

A –he gave me spiritual counseling directly, specifically directed at the spiritual.

Q You can't separate the spiritual and the secular marital counseling, can you?

VOL. 2 PAGE 160 LINES 1-2

A I can't separate the person who gave me counseling, so I can't separate what was spiritual, what was secular counseling.

VOL. 3 PAGE 46 LINES 20-25

Q Okay. The question is, "Did he or didn't he give you that spiritual guidance, with regard to your suspicions that Allan was having an affair?"

A "As I stated before, Mr. Baucum did not give specific spiritual guidance toward one specific problem of my marital problems, he generated them–he gave them to my marital problems as a whole."

VOL. 4 PAGE 3 LINES 4-16

Q (BY MR. FARGASON) Will you look at the testimony that's outlined in orange there, and would you read that for the Court, please– or for the jury? Excuse me.

A "And I cannot separate the fact that he was my counselor and he was my pastor some of the time." Then you said, "It's hard." And then, "He gave you spiritual counseling directly, specifically directed at the spiritual. You can't say"-- "you"--

Q Question, "You can't separate the spiritual and secular marriage counseling, can you?" Answer?

A "I can't separate the person who gave me counseling, so I

can't separate what was spiritual, what was secular counseling."

VOL. 5 PAGE 46 LINES 7-21

Cynthia Mullanix

Q You talked about Scripture with Shelby Baucum, Didn't you, in counseling?

A Shelby quoted Scripture– he had quoted Scripture, yes.

Q You talked about Scripture with Shelby Baucum, didn't you?

A Yes.

Q What is your definition of spiritual counseling or a spiritual counselor?

A I don't know exactly what my definition is. I guess someone who's trained to give you counseling regarding the Scriptures.

Q Would you say it's someone that your asking for advice concerning your spiritual life?

A Yeah, I would agree with that.

Q And how would you define pastoral counseling?

A A minister providing counseling.

VOL. 5 PAGE 47 LINES 3-7

Q Was Shelby Baucum a spiritual counselor to you?

A Yes.

Q Now, the first counseling you received from Shelby Baucum is — started out strictly as spiritual counseling, didn't it?

A Yes.

VOL. 5 PAGE 47 LINES 22-25

Q In the counseling that you claim started in December–sometime in December of 1990 and continued until September of 1991, that also included interpretation and discussions of scriptures by both of you?

VOL. 5 PAGE 48 LINES 1-8

A Well, yes, Shelby used that, yes.

Q And you discussed it with him?

A Yes.

Q Specifically, you talked about how God felt about love?

A Yes.

Q You felt– how God felt about love between a husband and a wife?

A Yes.

VOL. 5 PAGE 48 LINES 20-25

Q Well, you do agree that he did– Shelby Baucum did encourage you to stay married to your husband?

A Yes, up until the end, yes.

Q Did you discuss First Corinthians, Chapter 13 as an example of what true love was supposed to be?

A Yes.

VOL. 5 PAGE 49 LINES 1-3 and 7-15

Q And that that was the love that Christ–that that was Christ's love, an example of Christ's love?

A Yes

Q And that that's how other people should love each other?

A Yes.

Q That that was applicable to all relationships?

A Yes.

Q And when he told you to go home–he told you to go home and read the First Corinthians, Chapter 13, didn't he?

A Yes.

Q And did you do that?

A Yes.

VOL. 5 PAGE 50 LINES 1-25

A No

Q Did you believe that that was good advice that any Baptist minister–you testified about your knowledge of Baptist ministers and what goes on at Baptist churches extensively yesterday. Advising you to go home and read Chapter 13 of First Corinthians would be what any Baptist minister would advise you to do; isn't that correct?

A Yes.

Q And that was spiritual advice, wasn't it?

A Not the advice Shelby gave me, no.

Q I'm asking about going home and reading First Corinthians Chapter 13, that is spiritual advice, isn't it?

A Yes.

Q And that's the advice Shelby Baucum gave you during one of these counseling sessions, is to go home and read Chapter 13 of First Corinthians; isn't that correct?

A Yes, but he prefaced that with other instruction.

A Is that correct or not? Is that correct or not?

A Yes.

Q Okay. Did you discuss with Shelby Baucum rules and regulations of the Baptist church?

A Yes.

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Q And did you discuss his interpretation of those rules and regulations?

A Yes.

Q Some of those you agreed with and some of them you didn't; isn't that right?

A Yes.

Q Some of those were good advice and some of those you consider not good advice?

A I don't know that he gave me advice regarding that.

Q Just his interpretation?

A Yes.

Q Some of what you believe to be Biblically and Scripturally sound and some of it you disagree with; isn't that correct?

A I personally disagree with it. I did not think it was sound, but it was just difference of opinion.

Q Right. As far as you know, there was nothing that conflicted with the Bible about what he talked about in rules and regulations of the Baptist church?

A No.

Q And you agree that the other Baptist ministers could have told you the same thing?

A Yes.

Q One of the things that you believed was that Shelby Baucum had a liberal interpretation of the Scripture?

A Yes.

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Q Do you agree with that?

A Yes.

Q And do you agree that there are other Baptist ministers who could have given you also a liberal interpretation of the Scripture?

A Yes.

Q Giving you a liberal interpretation of the Scripture was not necessarily bad advice–or bad interpretation or wrong– or an incorrect interpretation; isn't that correct?

A Yes.

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Q When did you talk about Scripture?

A Probably–I don't know, maybe– I mean, several times during the entire period prior to September.

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Q You will agree that spiritual counseling, as you have defined it, includes discussion of Scripture?

A Yes, sir.

Q And when we're talking about Scripture, we're talking about the Bible. Do you agree with that?

A Yes.

Q And it includes interpretation of Scripture, interpretation of the Bible?

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A Yes.

Q And you did that with Shelby Baucum, didn't you, in counseling?

A Shelby told me what he thought it thought–he thought it meant, yes.

Q You did interpretation of Scripture and discussion of Scripture with Shelby Baucum in the counseling sessions, didn't you?

A Yes.

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Q Sometimes you talked about the marital problems and Scripture in the same session; isn't that right?

A Yes, but I didn't say he was my spiritual –

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Q I'm sorry. Did you say yes? You went by that too quickly. I couldn't understand you. Is the answer yes?

A Yes. Not that I said he was my spiritual advisor. The answer is yes to the question we talked about Scripture and my marriage in the same session.

VOL. 5 PAGE 91 LINES 3-6

Q You don't remember testifying just a few minutes ago before this jury that he interpreted Scripture during counseling sessions?

A Yes.

VOL. 12 PAGE 96 LINES 8-20

Peter Rutter, M.D.

Q (BY MR. FARGASON) Doctor, you read portions of the deposition where Cynthia Mullanix and Robyn Sanders talked about their counseling– what was said and done in counseling?

A Yes.

Q And you believe you've defined that in your deposition as pastoral counseling; is that correct?

A I think in my affidavit– if you could show me in the deposition.

Q Was it a pastoral counseling relationship?

A I think originally that is the role that is expected when a minister offers counseling, counseling of a personal nature for personal problems. That's an expectable, common role that ministers do. So, yes, I would say that.

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Q Did they or did they not discuss Scripture in their counseling relationship?

A Yes.

Q Yes?

A Yes.

Q And that Shelby Baucum gave them advice based upon his interpretation of the Scripture. You do remember that testimony?

A That's one of the things that happened.

Q In the counseling relationship?

A Yes.

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Q He was a minister of a church, and any counseling that took place grew out of his role as minister of that church?

A That's where it began, yes.

Q And it grew out of their, the plaintiffs', understanding that he was a spiritual and religious leader at that church?

A That was one of the elements in their understanding who he was and inducing trust in him.

Q And they looked to him for religious guidance and leadership?

A Yes.

Q And that's one of the things that happened in the counseling relationship that kept them going, was this religious and spiritual guidance?

A I think there was a great mixing of that and using that toward specific misguided counseling ends, but that was in there, too, yes.

Q And the advice that this– that Shelby Baucum gave them was advice that was based upon Biblical–as he interpreted Biblical Scriptures, stay in your marriage, the Bible says you should stay in your marriage?

A To some extent, yes.

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Shelby Baucum

Q Have you ever been licensed as as counselor by any local, state or national organization?

A No.

Q Have you ever been licensed or certified– I mean certified as a counselor by any local, state or national organization?

A No.

Q Have you ever had a certificate that said you were a

VOL. 14 PAGE 59 LINES 1-5

counselor on your wall?

A No.

Q Have you ever had any kind of license that said you were a counselor on your wall?

A No.

VOL. 14 PAGE 44 LINES 12-23

Shelby Baucum

Q Now, what degree did you get from Wayland University?

A I got BA in religious education.

Q Does that– did you take some counseling courses in connection with your college work at Wayland Baptist University?

A I took some psychology courses that were required for the degree.

Q What were the psychology courses, the best you can remember? You don't have to spend a long time looking at that.

A They were required courses. One of them was Introduction to Psychology and then there were several choices you could take, and I took Adolescent Psychology.

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Q Did you have any psychology courses in the seminary?

A There were two required courses.

Q Did you have any counseling courses other than the two

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psychology courses that were required?

A There was a course called The Art of Listening, and I believe–I'm not sure what the title was, that's the name of the book, and we were taught to listen to a person's problem and then refer them– referral was– to listen and refer was the emphasis of the class.

The other class I don't– I think it was required, but I don't remember the contents of it.

Q Do you remember when you graduated from the seminary in Fort Worth?

A 1962.

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Q Have you ever been licensed as as counselor by any local, state or national organization?

A No.

Q Have you ever been licensed or certified– I mean certified as

a counselor by any local, state or national organization?

A No.

Q Have you ever had a certificate that said you were a

VOL. 14 PAGE 59 LINES 1-5

counselor on your wall?

VOL. 14 PAGE 59 LINES 22-25

Q While you were a minister of education and administration, was it part of your job to – well, was there a counselor employed or with a contractual arrangement with Casa View Baptist Church?

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A Yes, there was.

Q And who was that counselor?

A Ray Addison.

Q And what was Ray Addison's job as far as you understood it?

A He was on retainer for the church, and the staff was to refer any problem, marital or personal problems, that we came across or someone came to–we were to refer to Ray Addison.

SUMMARY OF PLAINTIFFS' SECOND AMENDED COMPLAINT

The complaint, in paragraphs 4.20 through 4.40, sets forth the extremely specific factual allegations Plaintiff SANDERS is making regarding BAUCUM. R.Ex. 10. Under those paragraphs, Plaintiff SANDERS asserted the following: at all times material to this action she was a member of CASA VIEW (R.Ex. 10; PARG. 4.20); she was employed by CASA VIEW as an administrative secretary from February 26, 1990 through December 2, 1991 (R.Ex. 10; pargs. 4.21 and 4.80); during most of that time BAUCUM was her immediate supervisor (R.Ex. 10; parg. 4.21); at the time she was employed by CASA VIEW, she was experiencing marital problems and shortly after her employment, BAUCUM "... offered his services as a pastoral counselor to help her cope with [her] marital situation..." (R.Ex. 10; pargs. 4.22 and 4.23); she accepted BAUCUM's invitation to provide "pastoral counseling" and "BAUCUM and Sanders began conducting pastoral counseling sessions at work" (R.Ex. 10;parg. 4.24); almost immediately after assuming her duties as administrative secretary, SANDERS' relationship with BAUCUM was that of "clergyman-church member, employer-employee, and pastoral counselor-counselee" (R.Ex. 10; parg. 4.24); during these "pastoral sessions" BAUCUM solicited her trust and confidence in his ability to help with her problems (R.Ex. 10; parg. 4.25); during the course of the "pastoral counseling relationship," BAUCUM related to her marital problems that he was experiencing (R.Ex. 10; parg. 4.26); during the course of the "pastoral counseling relationship," BAUCUM made representations regarding his feelings and affections toward her (R.Ex. 10; parg. 4.27); during the course of the "pastoral counseling relationship," BAUCUM made representations to her regarding the "religious significance" of his feelings toward her and her feelings toward him; BAUCUM told her that "that he was grateful that 'God had given him someone'"; and BAUCUM to her that "he did not believe God disapproved of anyone expressing or showing their love"(R.Ex. 10; parg. 4.28); and throughout this relationship, BAUCUM continued to make representations regarding his feelings and affections toward SANDERS and the religious significance of their relationship" (R.Ex. 10; parg. 4.30); At no point during these

factual allegations made by Plaintiff SANDERS in the Complaint, does Plaintiff SANDERS allege the existence of a secular or non-pastoral counseling relationship.

Paragraphs 4.41 through 4.61 of the Complaint contain the factual allegations of Plaintiff MULLANIX regarding her alleged counseling relationship with BAUCUM. Pertinent portions of those factual allegations are set forth as follows: at all times material this case, Plaintiff MULLANIX was a member of CASA VIEW (R.Ex. 10; parg. 4.41); in November 1990, Plaintiff MULLANIX and her husband began experiencing marital problems, and BAUCUM approached MULLANIX and her husband at church and offered to provide her husband and her with "pastoral counseling in an effort to resolve their marital problems" (R.Ex. 10; pargs. 4.42 and 4.43); in December 1990, after Plaintiff MULLANIX and her husband had seperated, BAUCUM again offered to provide "pastoral counseling services to MULLANIX and her husband" and she accepted his invitation (R.Ex. 10; parg. 4.44); Plaintiff MULLANIX and her husband began seeing BAUCUM as a "pastoral counselor" and the "pastoral counseling sessions" with Plaintiff MULLANIX and her husband were eventually conducted separately (R.Ex. 10; parg. 4.45); during these "pastoral counseling sessions," BAUCUM solicited her trust and confidence in his ability to help her with her problems and she disclosed, in confidence, many details regarding her marital and other problems to BAUCUM (R.Ex. 10; parg. 4.46); during the course of the "pastoral counseling relationship," BAUCUM began relating to MULLANIX marital problems he was experiencing, and he eventually made representations regarding his feelings and affections toward her (R.Ex. 10; pargs. 4.47 and 4.48); during the course of the "pastoral counseling relationship" BAUCUM also made representations to her regarding the "religious significance" of his feelings toward her, he told her that he was "grateful that 'God had given him someone'," and that he told her that "he did not believe God disapproved of anyone expressing or showing their love" (R.Ex. 10; parg. 4.49); throughout their relationship, BAUCUM continued to make representations regarding his feelings and affections toward her and the "religious significance of their relationship" (R.Ex. 10; parg. 4.51); and she was hired as a receptionist at CASA VIEW on

March 1, 1991, and after that date the relationship between her and BAUCUM was that of "clergyman-church member, pastoral counselor-counselee, and employer-employee" (R.Ex. 10; parg. 4.53).

The Complaint contains additional relevant allegations as to the nature of the alleged counseling relationships as follows: during the weekend of September 20-22, 1991, Plaintiffs discovered that they had each had a romantic/sexual relationship with BAUCUM at the same time and they realized "that BAUCUM had abused the trust and confidence placed in him as her(their) minister and pastoral counselor..." (R.Ex. 10; parg. 4.62); subsequently, on September 23, 1991, Plaintiffs related to a representative of CASA VIEW "the circumstances surrounding their respective pastoral counseling by Baucum..." (R.Ex. 10; parg. 4.65).

In paragraphs 6.1 through 8.13 of the Complaint, Plaintiffs allege that BAUCUM committed various breaches of fiduciary duties (i.e. abuse of power in seducing Plaintiffs, fraud in seducing Plaintiffs, and disclosure of confidential information). R. Ex. 10. Importantly, with each of these various alleged breaches of fiduciary duties, Plaintiffs incorporate and reallege, in full, the factual allegations contained in paragraphs 4.20 through 4.80, which paragraphs have been summarized above. R.Ex. 10; pargs. 6.1, 7.1 and 8.1. As to each of these breach of fiduciary duties claims, the various duties which Plaintiffs allege BAUCUM owed to them and breached arose out of and are grounded upon their respective "clergyman-member" and "pastoral counselor-counselee" relationships with BAUCUM. R. Ex. 10; pargs. 6.1-6.11, 7.1-7.5, 7.7 and 7.8, 8.1-8.7.

In paragraphs 9.1 through 9.12 of the Complaint, Plaintiffs set forth their legal bases for their claim entitled "Negligence (Malpractice in Defendants Pastoral Counseling)' which they are asserting against BAUCUM. R. Ex. 10. As was done concerning their breach of fiduciary duties claims, Plaintiffs incorporate and reallege, in full, their factual allegations contained in paragraphs 4.20 through 4.80 of the Complaint. R. Ex. 10;parg. 9.1. Importantly, Plaintiffs base their negligence claims, once again, on their respective "pastoral counselor-counselee" and "clergyman-member" relationships with BAUCUM. R.Ex. 10; pargs. 9.1-9.7. Specifically, regarding their "pastoral counselor-counselee" relationships, Plaintiffs allege that BAUCUM

owed a duty to them "... to exercise reasonable care in providing pastoral counseling services." R.Ex. 10; pargs. 9.2 and 9.3. Plaintiffs assert that such duty required BAUCUM to"...exercise that degree of skill in learning normally applied by pastoral and secular counselors." R. Ex. 10; pargs 9.2 and 9.3. Importantly, the term "secular" is used only twice throughout the entire Complaint, in the limited context of establishing the standard of care by which BAUCUM's pastoral counseling services were to be measured. R.Ex. 10; pargs. 9.2 and 9.3. Finally, Plaintiffs allege that Baucum was negligent "during the course of their relationship as "clergyman-member" and "pastoral counselor-counselee" by soliciting affection, emotional dependence and control of their spiritual, mental and emotional well-being and by otherwise using said relationship for a purpose other than the improvement of their spiritual, mental and emotional well-being. R. Ex. 10; pargs. 9.6 and 9.7

U. S. District Court
Northern District of Texas
FILED
JAN 24 1996
NANCY DOHERTY, Clerk
By "s/ CY"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBYN SANDERS &	§	
CYNTHIA MULLANIX,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO.**
	§	**3:92-CV-1630-P**
SHELBY BAUCUM,	§	
	§	
Defendant.	§	

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

* * *

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DATED: January 24, 1996.

"s/ Jorge A. Solis"
UNITED STATES DISTRICT JUDGE

Page 6

Overview of Claims

Plaintiffs Robyn Sanders and Cynthia Mullanix have asserted several claims against Defendant Shelby Baucum for which they seek damages. It has been specifically asserted:

1. Defendant was negligent and grossly negligent in providing the Plaintiffs with secular marital or mental health counseling and such negligence proximately caused each of the

Plaintiffs to suffer mental and emotional injuries; and

2. Defendant breached certain fiduciary duties owed to Plaintiffs by virtue of the trust and influence gained through secular marital or mental health counseling and such misconduct proximately caused each of the Plaintiffs to suffer mental and emotional injuries.

* * *

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Professional Malpractice in Marital or Mental Health Counseling: The Cause of Action

The first claim which you must consider is that the Defendant is liable for professional malpractice in secular marital or mental health counseling. This tort differs from that of ordinary negligence in that it arises from certain relationships and holds certain persons, by virtue of their actual, apparent or proclaimed superior skill, knowledge or competence, to a higher standard of care. The basis of liability under the tort of professional malpractice in secular marital or mental health counseling is the negligent performance of duties within the scope of the counseling relationship.

The First Amendment, and its mandate that the realms of church and state remain separate, does not allow a claim for "clergy malpractice." This type of action is not permitted so as to avoid excessive entanglement by the courts in the investigation and evaluation of religious tenets and doctrines. As a result of this law, the Plaintiffs' first cause of action only encompasses malpractice in secular marital or mental health counseling and does not apply to spiritual counseling.

Accordingly, as used in this charge, the term "secular marital or mental health counseling" means "counseling to achieve the mental, emotional, physical, social, educational, marital, or career-oriented development and adjustment of the client."

The term "spiritual counseling" means "counseling which is grounded in spirituality and the religious tenets, doctrines and theological beliefs of a particular religion."

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Standard of Care

Before analyzing the elements of the Plaintiffs' claim for

malpractice in secular marital and mental health counseling, you must first consider the appropriate standard of care against which the conduct of Defendant must be measured. The Plaintiffs allege that Defendant held himself out as having the skill, knowledge or competence of a secular marital or mental health counselor and purported to provide them with such counseling. In the event you find there was such a counseling relationship, Defendant's conduct must thus be measured against that degree of care which a reasonably prudent counselor or ordinary prudence in secular marital or mental health counseling would use under the same or similar circumstances. "Negligence" under this standard is the failure to do that which a counselor in secular marital or mental health counseling would have done under the same or similar circumstances or doing that which a counselor in secular marital or mental health counseling would not have done under the same or similar circumstances.

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Elements

In order to find professional malpractice in secular marital or mental health counseling of any Plaintiff by Defendant, you must find, by a preponderance of the evidence, four elements:

- First, that Defendant had the actual, apparent, or proclaimed skill, knowledge or competence of a reasonably prudent secular marital or mental health counselor;
- Second, that a counseling relationship existed between Defendant and each Plaintiff and that such counseling was essentially secular marital or mental health counseling in nature;
- Third, that Defendant was negligent in performing such counseling; and
- Fourth, that such negligence was a proximate cause of harm to each Plaintiff.

* * *

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Liability of Defendant
Question # 1

* * *

Question # 2

* * *

Page 13

B. If you find that a counseling relationship existed, do you find that such counseling relationship was essentially secular marital or mental health counseling in nature?

Robin Sanders	Yes ___X_____	No_____
Cynthia Mullanix	Yes ___X_____	No_____

Question # 3

* * *

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Breach of Fiduciary Duty:
The Cause of Action

The next claim which you must consider is that Defendant is liable for breaching fiduciary duties owed to the Plaintiffs in providing secular marital or mental health counseling. The tort of breach of fiduciary duty differs from that of professional malpractice in secular marital or mental health counseling in that it may arise from a confidential relationship or when a relationship of trust is placed by one in another and the one relies on and acts on the representations of the other, whether the relationship is a social, domestic, or personal one.

A fiduciary relationship may be found to exist in cases where influence has been acquired and abused and in which confidence has been betrayed, however, mere subjective trust alone is not enough to transform an ordinary personal relationship into a fiduciary relationship.

The existence of a fiduciary relationship is to be determined from all of the circumstances of the relationship between the persons involved.

A fiduciary relationship cannot arise solely out of a minister-parishioner relationship.

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Elements

To hold that fiduciary duties were breached by Defendant in

providing secular marital or mental health counseling to any Plaintiff, you must find, by a preponderance of the evidence, three elements:

First, that a fiduciary relationship existed between Defendant and each Plaintiff, which arose from a counseling relationship which was essentially secular marital or mental health counseling in nature;

Second, that Defendant breached a fiduciary duty incurred by virtue of such fiduciary relationship; and

Third, that the breach of the fiduciary duties by Defendant was a proximate cause of harm to her.

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Liability of Defendant

Question # 5

Do you find that a fiduciary relationship existed between each Plaintiff and Defendant?

Robin Sanders	Yes ___X_____	No_____
Cynthia Mullanix	Yes ___X_____	No_____

Question #6

* * *

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Supreme Court, U.S.
FILED
JUN 29 1998
OFFICE OF THE CLERK

NO. 98-16

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

SHELBY BAUCUM,

Petitioner,

v.

ROBYN SANDERS, CYNTHIA MULLANIX
AND CASA VIEW BAPTIST CHURCH

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS ROBYN SANDERS AND CYNTHIA MULLANIX BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Petitioner has mischaracterized the Question Presented to the extent he alleges that the tort of clergy malpractice is at issue here and to the extent that he presumes that Respondents' counseling relationships with Petitioner involved an "inseparable mixture of spiritual and secular counseling." Respondents submit that the following more accurately states the question presented to the Court:

Whether the Free Exercise Clause of the First Amendment to the United States Constitution provides absolute tort immunity to ministers for secular misconduct which arises from counseling relationships which are not purely secular in nature?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On January 25, 1996, a jury sitting in the U.S. District Court for the Northern District of Texas rendered a verdict in favor of Respondents Cynthia Mullanix and Robyn Sanders and against Petitioner Shelby Baucum, a Minister employed by Respondent Casa View Baptist Church, on claims of professional malpractice and breach of fiduciary duties. The standards of care and fiduciary duties which the jury was instructed to consider were those applicable to secular marital and mental health counselors. The jury was required to and did find that Baucum had the actual or proclaimed skill of a reasonably prudent secular marital or mental health counselor and had engaged in counseling with Respondents which was "essentially secular marital or mental health counseling in nature." (App. 23a, 25a-26a).

In denying Baucum's post-trial motions, the District Court found substantial evidence to support a finding that Respondents' counseling relationships with Baucum were essentially secular in nature.[1] (App. 23a-25a).

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[1] To the extent the Petition alleges otherwise, it is misleading because it does not cite all of the relevant testimony and, indeed, ignores all of the testimony relied upon by the District Court.

The Fifth Circuit Court of Appeals affirmed. The Court found that the jury's verdict was based upon secular standards and duties, not religious doctrine, and was thus not tantamount to a finding of "clergy malpractice." (App. 4a-5a)

The Court of Appeals also held that to invoke the protection of the Free Exercise Clause, Baucum was required to "assert that the specific conduct allegedly constituting a breach of his professional and fiduciary duties was rooted in religious belief." The Court thus did not address the nature of the underlying counseling relationships. The Court opined that "by instructing the jury to consider whether Baucum's counseling, rather than his alleged misconduct, was "essentially secular" in nature, the district court provided more than adequate protection under the Free Exercise Clause. Since Baucum did not allege that any of the specific misconduct shown by the evidence was rooted in religious belief,[2] his First Amendment defense was rejected. (App. 4a-9a)

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[2] Respondents' malpractice evidence showed that, as their counselor, Baucum failed to refer them to another counselor, expressed love and affection toward them, failed to redirect their attention back to counseling when they expressed love and affection for him, initiated sexual relations with them, and threatened them. (App. 37a, n. 10) Respondents' evidence showed that Baucum breached his fiduciary duties as a counselor by initiating sexual relationships with them and disclosing confidences shared in counseling. (App. 38a)

REASONS FOR DENYING WRIT

This Court has already formulated the principles by which First Amendment challenges are governed. The Court has said that the Free Exercise Clause protects only conduct rooted in religious belief. *Smith v. Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79 (1990); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 713 (1981). Secular conduct is not protected. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

This Court has also rejected the notion of absolute immunity for religious conduct. The protection afforded by the Free Exercise Clause is only against governmental action which purports to regulate religious conduct because of its religious motivation. *Smith*, 494 U.S. 878-79. The protection of the Free Exercise Clause does not extend to valid and neutral laws of general application. This Court has held that since such laws do not have as their specific object the regulation of religious conduct, they can be enforced to proscribe (or prescribe) conduct which one's religion prescribes (or proscribes) without offending the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Smith*, 494 U.S. 872.

Baucum's argument that he and other ministers enjoy absolute tort immunity for secular misconduct which arises from counseling relationships which are not purely secular in nature is contrary to these established principles. The reasons

advanced by Baucum for granting his Petition for Writ largely ignore this conflict and do not otherwise show how the Court of Appeals' decision below incorrectly followed this Court's First Amendment jurisprudence. Likewise, Baucum does not show how dicta in *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994), which the Court of Appeals readily distinguished from the facts of this case, presents a conflict amongst the Courts of Appeal. In short, no reason has been advanced for this Court to reexamine the scope of protection afforded by the Free Exercise Clause in the context of this case.

CONCLUSION

For the reasons cited above, the Petition for Writ should be denied.

Respectfully submitted,

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